

RHONDA TRACY,)

5 Plaintiff,)

6 -vs-) No. 99 C 2736

7 JEWEL FOOD STORES, INC.,)

AMERICAN STORES COMPANY,)

8 WALMART STORES, INC.,)

DOMINICK'S FINER FOODS,)

9 INC., DRYPERS CORPORATION,)

KIMBERLY-CLARK CORPORATION,)

10 AND CONFAB HOLDING)

CORPORATION,)

11 Defendants.)

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16 Videotaped deposition of RHONDA TRACY taken
17 before NADINE J. WATTS, CSR, RPR, and Notary Public,
18 pursuant to the Federal Rules of Civil Procedure for the
19 United States District Courts pertaining to the taking
20 of depositions, at Suite 5500, One First National Plaza,
21 in the City of Chicago, Cook County, Illinois,
22 commencing at 10:07 o'clock a.m. on the
23 25th day of May, A.D., 2000.

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<p style="text-align: right;">2</p> <p>1 There were present at the taking of this 2 deposition the following counsel: 3 4 COOK, ALEX. McFARRON, MANZO, CUMMINGS & MEHLER, LTD., by 5 MR. EDWARD D. MANZO, 200 West Adams Street Suite 2850 6 Chicago, Illinois 60606 (312) 236-8500 7 on behalf of the Plaintiff: 8 9 FULBRIGHT & JAWORSKI, L.L.P., by MS. LINDA L. ADDISON and 10 MR. MICHAEL S. McCOY, 1301 McKinney Suite 5100 Houston, Texas 77010 (713) 651-5628 12 on behalf of Defendant Drypers Corporation; 13 14 SIDLEY & AUSTIN by 15 MR. WILLIAM H. BAUMGARTNER, JR., and MR. RUSSELL E. CASS, 16 One First National Plaza Chicago, Illinois 60603 (312) 853-7350 17 on behalf of Defendant Kimberly-Clark Corporation: 18 19 20 MR. KYLE K. KAPPES, 401 North Lake Street 21 P.O. Box 349 Neenah, Wisconsin 54957 (920) 721-2331 22 on behalf of Kimberly-Clark Corporation: 23 24</p>	<p style="text-align: right;">4</p> <p>1 DEPOSITION OF RHONDA TRACY 2 May 25, 2000 3 4 EXAMINATION BY: PAGE 5 Mr. William H. Baumgartner, Jr. 6 6 Ms. Linda L. Addison 73 7 Mr. Craig R. Smith 136 8 Mr. Edward D. Manzo 198 9 10 Confidential pages marked 71-72 and 134-135. 11 12 * * * * * 13 14 EXHIBITS 15 16 17 18 19 20 21 22 23 24</p> <table> <tr> <th></th><th>PAGE</th></tr> <tr> <td>Deposition Exhibit No. 1</td><td>7</td></tr> <tr> <td>Deposition Exhibit No. 2</td><td>7</td></tr> <tr> <td>Deposition Exhibit No. 3</td><td>8</td></tr> <tr> <td>Deposition Exhibit No. 4</td><td>8</td></tr> <tr> <td>Deposition Exhibit No. 5</td><td>19</td></tr> <tr> <td>Deposition Exhibit No. 6</td><td>28</td></tr> <tr> <td>Deposition Exhibit No. 7</td><td>32</td></tr> <tr> <td>(not attached)</td><td></td></tr> <tr> <td>Deposition Exhibit No. 7A</td><td>34</td></tr> <tr> <td>(not attached)</td><td></td></tr> </table>		PAGE	Deposition Exhibit No. 1	7	Deposition Exhibit No. 2	7	Deposition Exhibit No. 3	8	Deposition Exhibit No. 4	8	Deposition Exhibit No. 5	19	Deposition Exhibit No. 6	28	Deposition Exhibit No. 7	32	(not attached)		Deposition Exhibit No. 7A	34	(not attached)	
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<p style="text-align: right;">3</p> <p>1 FISH & RICHARDSON, P.C., MR. CRAIG R. SMITH, 2 225 Franklin Street Boston, Massachusetts 02110 3 (617) 956-5968 4 on behalf of Defendant Confab Holding Corporation. 5 6 7 8 ALSO PRESENT: Mr. Slawomir Kojro, videographer Ms. Jeana Lervick Mr. John Brodersen 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24</p>	<p style="text-align: right;">5</p> <p>1 Deposition Exhibit No. 8 48 (not attached) 2 3 Deposition Exhibit No. 9 23 (not attached) 4 Deposition Exhibit No. 10 42 (not attached) 5 6 Deposition Exhibit No. 11 43 (not attached) 7 Deposition Exhibit No. 12 53 (not attached) 8 9 Deposition Exhibit No. 13 58 (not attached) 10 Deposition Exhibit No. 14 92 11 Deposition Exhibit No. 15 92 12 Deposition Exhibit No. 16 102 13 Deposition Exhibit No. 17 103 14 Deposition Exhibit No. 18 108 15 Deposition Exhibit No. 19 111 (not attached) 16 17 Deposition Exhibit No. 20 187 (not attached) 18 Deposition Exhibit No. 21 189 (not attached) 19 20 * * * * * 21 22 23 24</p>																						

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<p style="text-align: right;">6</p> <p>1 THE VIDEOGRAPHER: My name is Slawomir Kojro. I'm 2 a video technician for Depovision located at 20 North 3 Clark Street, Chicago, Illinois. The date is May 25, 4 2000. The time is 10:09 a.m. 5 We are present here today at One First National 6 Plaza, Chicago, Illinois, with reference to the case 7 entitled Rhonda Tracy -v- Jewel Food Stores, 8 Incorporated, et al., pending in the United States 9 District Court, Northern District of Illinois, Eastern 10 Division, Case No. 99 C 2736. The witness is Rhonda 11 Tracy. 12 An audiovisual recording of this deposition is 13 at the request of the defendant. 14 One moment, please. Will the court reporter 15 identify herself and swear in the witness. 16 RHONDA TRACY, 17 called as a witness herein, having been first duly 18 sworn, was examined upon oral interrogatories and 19 testified as follows: 20 EXAMINATION 21 by Mr. Baumgartner: 22 MR. BAUMGARTNER: Q We're subject to a five-hour 23 time limit today, and we can't pose all the questions 24 that we have of the witness, but we're going to try and</p>	<p style="text-align: right;">8</p> <p>1 average skill in the field of designing disposable 2 diapers? 3 A Yes. 4 Q I'm going to hand you Defendant's Exhibit 3, 5 which is a design application filed with the United 6 States Patent Office. This is a design application that 7 you filed with the Patent Office in 1987; is that 8 correct? 9 A That's correct. 10 Q Does your signature appear on the first page of 11 the design application? 12 A It does. 13 Q I'm handing you Defendant's Exhibit 4. This is 14 a Declaration, Petition and Power of Attorney that you 15 signed on March 2, 1987; is that correct? 16 A That's correct. 17 Q At the top of the first page it states in the 18 first sentence of text that you believe you are the 19 original, first and sole inventor of the invention 20 entitled An Ornamental Design for a Disposable Diaper. 21 Do you see that? 22 A Yes, I do. 23 Q If you turn back to your design patent 24 application, which is Defendant's Exhibit 3, do you see</p>
<p style="text-align: right;">7</p> <p>1 make a good start. 2 Would you state your name, please. 3 A Rhonda Tracy. 4 Q I've handed you what's been marked as 5 Defendant's Exhibit 1. It is U.S. Patent 5,797,824 the 6 inventor of this patent is Rhonda Tracy of Glen Ellyn, 7 Illinois. Is that you? 8 A Yes. 9 Q I'd now like to hand you what's been marked as 10 Defendant's Exhibit 2. It's U.S. Patent 5,064,421. Are 11 you the inventor on this patent as well? 12 A Yes. 13 Q Are there any other issued patents where you are 14 the named inventor? 15 A No. 16 Q Apart from the diaper designs described in 17 Defendant's Exhibit 1 and Defendant's Exhibit 2, have 18 you come up with any other designs for a disposable 19 diaper? 20 A No, I have not. 21 Q Do you consider yourself to be a disposable 22 diaper designer? 23 A Now I am, yes, sir. 24 Q Would you consider yourself to be of at least</p>	<p style="text-align: right;">9</p> <p>1 that -- would it be correct to say that its title is An 2 Ornamental Design for a Disposable Diaper? 3 A Yes. 4 Q Is it correct that the Declaration, Petition and 5 Power of Attorney, which is Defendant's Exhibit 4, was 6 submitted in connection with your design patent 7 application, Defendant's Exhibit 3? 8 A Yes. 9 Q Near the top of the first page of Defendant's 10 Exhibit 4 is some text that I have highlighted in 11 yellow. It reads as follows: "I have reviewed and I 12 understand the contents of the specification, including 13 the claims." Do you see that? 14 A Yes, I do. 15 Q You understand that that statement is made in 16 reference to your 1987 design application? 17 A Correct. 18 Q Was the highlighted statement true back in 1987 19 when you signed Defendant's Exhibit 4? 20 A Yes. 21 Q Would it be correct today that you still 22 understand the specification and claims in your design 23 patent application? 24 A Yes, I do.</p>

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<p style="text-align: right;">10</p> <p>1 Q Let's refer back now to Defendant's Exhibit 3, 2 which is your design patent application. 3 A Uh-huh. 4 MR. MANZO: Counsel, just for the record, I'm sorry 5 for interrupting your line of questioning, but we should 6 have appearances at least of what companies are 7 represented here today. 8 MR. BAUMGARTNER: All right, that's fine. 9 For Kimberly-Clark I'm Bill Baumgartner, and 10 several people are accompanying me who can identify 11 themselves. 12 MR. KAPPES: I'm Kyle Kappes with Kimberly-Clark. 13 MR. CASS: Russ Cass with Sidley & Austin 14 representing Kimberly-Clark. 15 MR. BRODERSEN: John Brodersen with Kimberly-Clark. 16 MR. SMITH: Craig Smith of Fisher & Richardson 17 representing Confab Holding Corporation. 18 MS. ADDISON: Linda Addison and Mike McCoy, 19 Fulbright & Jaworski, representing Drypers. 20 MR. MANZO: Okay. So no other defendants are 21 represented today; is that correct? 22 MR. BAUMGARTNER: Evidently. 23 MR. MANZO: And we will probably be getting into 24 confidential testimony. I think at some point we need</p>	<p style="text-align: right;">12</p> <p>1 only need to do it on one side. 2 A Okay. 3 Q Could you sign your name and write the date, 4 which I believe is -- 5 MR. MANZO: May 25. 6 MR. BAUMGARTNER: Q May 25th. 7 A (Indicating.) 8 Q Thank you. Back in 1987 do you believe that a 9 diaper designer reading your design patent application 10 would have understood that the area you have highlighted 11 was soft? 12 A Could you repeat the question? I'm sorry. 13 Q Sure. Back in 1987 do you believe that a diaper 14 designer reading your design patent application would 15 have understood that the area you have highlighted was 16 soft? 17 A Yes. 18 Q How would a diaper designer who read your design 19 application in 1987 have known that the area you have 20 highlighted was soft? 21 A Because it is extra padding, and padding is 22 usually added for comfort. 23 Q How would a person looking at figure 2 know that 24 what you have highlighted is padding?</p>
<p style="text-align: right;">11</p> <p>1 to designate the transcript as confidential pursuant to 2 the terms of the protective order. 3 MR. BAUMGARTNER: That's agreeable to us. 4 MR. MANZO: My name is Edward Manzo. I represent 5 the plaintiff. I'm accompanied by my summer associate, 6 Jeana Lervick. Proceed. 7 MR. BAUMGARTNER: Q Thank you, sir. 8 We're looking at Defendant's Exhibit 3, which 9 is your design patent application. Would you turn over 10 to figure 2, please. 11 A Yes. 12 Q Does figure 2 show a soft padding member in the 13 waist region? 14 A It definitely shows that there is some padding 15 that has been added. 16 Q Does it show a soft padding member? 17 A Well, any padding that's added to a baby diaper 18 is commonly soft. So I would say yes. 19 Q Could you take this pink highlighter and 20 highlight for me the soft padding member in the waist 21 region that is shown in figure 2? 22 A (Indicating.) 23 Q Would you take this blue felt-tip and write soft 24 padding member next to what you've highlighted. You</p>	<p style="text-align: right;">13</p> <p>1 A Well, there's definitely a strip of an extra 2 member affixed to the waistband and to the legs as well. 3 Q And a person of ordinary skill in the diaper art 4 back in 1987, if he saw a strip of an extra member added 5 in the waist region, would know that that was for 6 padding? 7 A If he's an expert, I would hope that he would 8 know it's padding. 9 Q Well, I'm not talking about an expert now. I'm 10 talking about an average diaper designer. Do you 11 believe -- 12 A As myself do you mean? 13 Q Well, an average diaper designer back in 1987. 14 Your belief is that if an average diaper designer saw a 15 strip of extra material in the waist region of a diaper, 16 that that average diaper designer would know that that 17 strip was for padding? 18 A Just by looking at the design application, I 19 would say yes. You're talking strictly about figure 2, 20 or are we talking as well figure 3? 21 Q Well, is there a difference in the analysis of 22 the two figures? 23 A Well, I think that figure 3 does show that there 24 is a loop around here of an extra piece of material as</p>

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<p style="text-align: right;">14</p> <p>1 well.</p> <p>2 Q So basically if an average diaper designer back</p> <p>3 in 1987 sees a strip of extra material in the waist</p> <p>4 region, he would know that that strip was soft and was</p> <p>5 padding?</p> <p>6 MR. MANZO: Objection. Is your question limited to</p> <p>7 the drawings of Exhibit 3, or are you asking an abstract</p> <p>8 question about any old diaper with any old strip on it?</p> <p>9 MR. BAUMGARTNER: It's a general question.</p> <p>10 MR. MANZO: Then I object to the question.</p> <p>11 foundation and unduly vague, calls for speculation.</p> <p>12 THE WITNESS: Okay?</p> <p>13 MR. BAUMGARTNER: Q You can now answer. Would you</p> <p>14 like the question read back?</p> <p>15 THE WITNESS: If I may rethink this, I would have to</p> <p>16 say the word soft perhaps is questionable in a design</p> <p>17 application.</p> <p>18 MR. BAUMGARTNER: Q So a person of ordinary skill</p> <p>19 in the art looking at the design application would not</p> <p>20 necessarily know that the region you have highlighted in</p> <p>21 pink is soft?</p> <p>22 A Perhaps not.</p> <p>23 Q But you do believe that a person of ordinary</p> <p>24 skill in the art in 1987, looking at your design</p>	<p style="text-align: right;">16</p> <p>1 padding, it would provide comfort and, yes, perhaps it</p> <p>2 would be soft.</p> <p>3 Q It might or it might not be soft if it provides</p> <p>4 padding?</p> <p>5 A I would say more than likely it would be soft.</p> <p>6 Q But you wouldn't know for sure?</p> <p>7 A You know by tactile sensation, by touching it</p> <p>8 usually.</p> <p>9 Q Well, you can't touch the padding element --</p> <p>10 A Right.</p> <p>11 Q -- in your design patent application --</p> <p>12 A Right.</p> <p>13 Q -- because it's just a drawing on a piece of</p> <p>14 paper.</p> <p>15 A Well, and then going back to what you were</p> <p>16 saying about padding, padding is usually added for</p> <p>17 comfort. So I'd have to say, yes, more than likely it</p> <p>18 would be soft.</p> <p>19 Q So if a person who's an average diaper designer</p> <p>20 in 1987 sees something in a diaper design that he</p> <p>21 understands to be padding, he may or may not understand</p> <p>22 that the padding would be soft?</p> <p>23 A Perhaps just by looking at the picture itself he</p> <p>24 may not understand that.</p>
<p style="text-align: right;">15</p> <p>1 application, would understand that the region you've</p> <p>2 highlighted in pink provided padding?</p> <p>3 A Provided padding.</p> <p>4 Q And can you explain for me why that is?</p> <p>5 A Well, it clearly shows that there is a new</p> <p>6 margin on each side of the diaper and on the leg holes</p> <p>7 as well. And it seems to be in a more bold fashion, I</p> <p>8 guess you could say, than the other areas of the diaper</p> <p>9 along the legs and the waistband.</p> <p>10 Q Can something provide padding and not be soft?</p> <p>11 MR. MANZO: Is this question directed to diapers,</p> <p>12 Counsel?</p> <p>13 MR. BAUMGARTNER: No, it's in general.</p> <p>14 THE WITNESS: I believe if you look in the</p> <p>15 dictionary about the word pad, you'll find that it's</p> <p>16 something that's added to provide comfort. I don't have</p> <p>17 a dictionary right in front of me, but I do recall it</p> <p>18 stated something close to that definition.</p> <p>19 MR. BAUMGARTNER: Q If something provides padding,</p> <p>20 is it soft?</p> <p>21 A In order for something to be comfortable, I</p> <p>22 would believe it has to be soft. So the dictionary</p> <p>23 clearly states comfort. So if something was hard, would</p> <p>24 it be comfortable? So I would have to say if it's</p>	<p style="text-align: right;">17</p> <p>1 Q Is there anything in the text of your design</p> <p>2 patent application that would indicate to a person who</p> <p>3 was an average diaper designer in 1987 that the area</p> <p>4 you've highlighted in pink would be soft?</p> <p>5 A May I read?</p> <p>6 Q Certainly, yes.</p> <p>7 A Okay. Counsel, could you please ask that</p> <p>8 question again?</p> <p>9 Q Certainly. Is there anything in the written</p> <p>10 text of your design application, which is Defendant's</p> <p>11 Exhibit 3, which would have indicated to an average</p> <p>12 diaper scientist in 1987 that the region you've colored</p> <p>13 pink was soft?</p> <p>14 A There is nothing in the text, sir.</p> <p>15 MS. ADDISON: Could I have that answer -- Could I</p> <p>16 have that answer read back, please.</p> <p>17 (Record read.)</p> <p>18 MR. BAUMGARTNER: Q The claim in your design patent</p> <p>19 application appears on the first page of Defendant's</p> <p>20 Exhibit 3. It says there, and I quote, "I claim the</p> <p>21 ornamental design for a disposable diaper as shown in</p> <p>22 the drawings." Do you see that?</p> <p>23 A Yes.</p> <p>24 Q All right. Now, we looked before at Defendant's</p>

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<p style="text-align: right;">18</p> <p>1 Exhibit 4, which you signed in 1987, and you said there</p> <p>2 "I have reviewed and understand the contents of the</p> <p>3 specification, including the claims." Do you recall</p> <p>4 that?</p> <p>5 A Yes.</p> <p>6 Q Is it correct that in order to be covered by the</p> <p>7 claim in your design patent application a diaper would</p> <p>8 have to have a soft padding member?</p> <p>9 MR. MANZO: Objection, this calls for a legal</p> <p>10 conclusion. She's not tendered as a patent law expert.</p> <p>11 MR. BAUMGARTNER: Q As you understood the claim</p> <p>12 based on your statement to the Patent Office that you</p> <p>13 read it and understood it.</p> <p>14 A May I reread it?</p> <p>15 Q Sure.</p> <p>16 A Sir, if I may answer in this way, which is I</p> <p>17 never wanted a design application to begin with. I</p> <p>18 wanted a utility patent. And Mr. Van Epps, who filed</p> <p>19 this application, he and I were in a disagreement from</p> <p>20 the beginning.</p> <p>21 And I had showed him my disclosure document,</p> <p>22 which had all of my explanations there before him</p> <p>23 describing the diaper, and he still insisted on filing</p> <p>24 as a design application. So that is my answer.</p>	<p style="text-align: right;">20</p> <p>1 Q Why don't you take a moment now to review the</p> <p>2 declaration and let me know when you're finished.</p> <p>3 A Okay, I'm finished.</p> <p>4 Q As of today, do you believe the statements in</p> <p>5 the declaration to be true?</p> <p>6 A Yes.</p> <p>7 Q Would you take a look at paragraph 2 in your</p> <p>8 declaration. There you state, and I quote, "on or about</p> <p>9 October 11, 1988 it came to my attention that Proctor &</p> <p>10 Gamble Company of Cincinnati, Ohio was distributing</p> <p>11 disposable diapers which I believe to be an infringement</p> <p>12 of the claim in my pending application." Do you see</p> <p>13 that?</p> <p>14 A Yes.</p> <p>15 Q Did the Proctor & Gamble diaper that you</p> <p>16 referred to in paragraph 2 of your declaration have a</p> <p>17 soft padding member?</p> <p>18 A Yes, it did.</p> <p>19 Q Can you describe the soft padding member?</p> <p>20 A It was a separate strip that was clearly</p> <p>21 distinct in the waistband.</p> <p>22 Q What did you do to evaluate the Proctor & Gamble</p> <p>23 diaper to see if it had the soft padding member you</p> <p>24 invented?</p>
<p style="text-align: right;">19</p> <p>1 Q All right. And I appreciate that information.</p> <p>2 Can you tell me whether you know whether in order to be</p> <p>3 covered by a claim in the design -- the claim in the</p> <p>4 design patent application a diaper would have to have a</p> <p>5 soft padding member?</p> <p>6 A I'd say yes.</p> <p>7 Q Now, I'm handing you what has been marked as</p> <p>8 Defendant's Exhibit 5. This is a Declaration in Support</p> <p>9 of a Petition to Make Special Under Rule 102(d).</p> <p>10 Does your signature appear on the second page</p> <p>11 of this document?</p> <p>12 A Yes, it does. Yes, it does.</p> <p>13 Q Did you sign this document on January 24, 1989?</p> <p>14 A Yes, I did.</p> <p>15 Q Above your signature it states, and I quote, "I</p> <p>16 declare that all statements made herein are true, and</p> <p>17 further, that these statements are made with the</p> <p>18 knowledge that willful false statements and the like so</p> <p>19 made are punishable by fines or imprisonment", and that</p> <p>20 continues, closed quotes. Do you see that language?</p> <p>21 A Yes, I do.</p> <p>22 Q At the time you signed this declaration did you</p> <p>23 believe the statements in the declaration to be true?</p> <p>24 A Yes.</p>	<p style="text-align: right;">21</p> <p>1 A To the best of my recollection back then, I</p> <p>2 believe I cut into the waistband and tore apart the</p> <p>3 different batting materials to see if there was an extra</p> <p>4 strip of padding within the waistband.</p> <p>5 Q Once you found the extra strip of padding, did</p> <p>6 you feel it?</p> <p>7 A Yes.</p> <p>8 Q Did it feel soft?</p> <p>9 A Yes, it did.</p> <p>10 Q Did it provide padding?</p> <p>11 A Yes, it did.</p> <p>12 Q How could you tell that?</p> <p>13 A I could not only see it, but it felt soft, as I</p> <p>14 said, to the touch.</p> <p>15 Q So if it feels soft to the touch, it provides</p> <p>16 padding?</p> <p>17 A This particular instance it did.</p> <p>18 Q Is there any doubt in your mind, sitting here</p> <p>19 today, that the Proctor & Gamble diaper referred to in</p> <p>20 paragraph 2 of your declaration had the soft padding</p> <p>21 member you invented?</p> <p>22 A I believe it did.</p> <p>23 Q So there's no doubt in your mind?</p> <p>24 A It's a long time ago. I vaguely remember the</p>

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<p style="text-align: right;">22</p> <p>1 incident, but I would have to say to the best of my 2 recollection. 3 Q All right. Now, attached to your declaration is 4 a picture of a baby wearing this Proctor & Gamble 5 diaper; is that correct? 6 A Yes. 7 Q Now, did that picture come from a photocopy you 8 made of the diaper bag? 9 A Yes. 10 Q You bought a bag of these diapers? 11 A Yes, I did. And I -- Well, I'm sorry. 12 Q I didn't mean to -- 13 A No -- 14 Q -- cut you off. 15 A And I copied the back of the diaper bag, I 16 believe it was at the Jewel at the time because they had 17 a copy machine right there. 18 Q This Jewel was in the Chicago area? 19 A In the western suburbs. 20 Q Of Chicago? 21 A Yes. 22 Q And you bought this bag of Proctor & Gamble 23 diapers in October of 1988; is that correct? 24 A Yes, that's correct.</p>	<p style="text-align: right;">24</p> <p>1 me tear this apart a little bit more if I may. 2 Q Sure. 3 A Yes, there is a soft batting material affixed to 4 kind of like a sticky piece of plastic right behind it. 5 Q Do you know what a top sheet is in a diaper? 6 A Yes, I do. 7 Q That's the material that is in contact with the 8 baby's body when the diaper is being worn? 9 A Yes. 10 Q Is the soft padding member in Defendant's 11 Exhibit 9 different from the top sheet? 12 A They're both soft. 13 Q No. Is it a different piece of material than 14 the top sheet? 15 A Does not -- Wait. Let me tear it apart a little 16 bit further here. 17 No, I don't believe it is. 18 Q The top sheet in that diaper is colored white; 19 is that correct? 20 A Yes. 21 Q And the soft padding member is colored blue? 22 A Yes. 23 Q The fact that one is white and the other is 24 blue, doesn't that suggest they're physically different</p>
<p style="text-align: right;">23</p> <p>1 Q So the Proctor & Gamble diapers that are 2 referred to in your declaration were on sale in the 3 United States in October of 1988? 4 A Yes. 5 Q I'm going to hand you what I have marked as 6 Defendant's Exhibit 9. This is one of the diapers that 7 your counsel produced to us this morning. 8 Can you tell me whether this is -- 9 MR. MANZO: What production number does it bear? 10 MR. BAUMGARTNER: I'm not sure. You can look at it 11 and tell us. 12 MR. MANZO: It's supposed to have a production 13 number. T2799. 14 MR. BAUMGARTNER: Q Thank you. 15 Is this one of the Proctor & Gamble diapers 16 referred to in paragraph 2 of your declaration, 17 Defendant's Exhibit 5? 18 A Yes. 19 MR. MANZO: What was the question? 20 (Record read.) 21 MR. MANZO: Thank you. 22 MR. BAUMGARTNER: Q Could you show us where in this 23 diaper the soft padding member is located? 24 A I believe it's right here, the blue strip. Let</p>	<p style="text-align: right;">25</p> <p>1 pieces of material? 2 A Well, what they have done is they have 3 interwoven a piece of the plastic material to provide a 4 barrier right there in the waistband strip. So they 5 have weaved it differently. 6 They have affixed -- they have gone through the 7 trouble of taking a certain width, which is, what, about 8 an inch-and-a-half, and weaving this soft piece of 9 material to it. 10 Q But you've managed to separate in this exhibit 11 the top sheet material from the soft padding material; 12 is that correct? 13 A Yes. 14 Q Do you know what a back sheet is in a disposable 15 diaper? 16 A Yes. 17 Q That's the outer cover that touches the parent 18 when the parent is holding the infant? 19 A Yes. 20 Q All right. Now, is the soft padding member a 21 different piece of material from the back sheet? 22 A Oh, yes, it is. 23 Q I take it that the soft padding member in this 24 Proctor & Gamble diaper, Exhibit 9, is formed from a</p>

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<p style="text-align: right;">26</p> <p>1 soft substance?</p> <p>2 A Yes.</p> <p>3 Q Does the soft padding member in the Proctor &</p> <p>4 Gamble diaper, Defendant's Exhibit 9, present a soft</p> <p>5 surface along at least a portion of the inside of the</p> <p>6 diaper waistband portion?</p> <p>7 A Yes, it does.</p> <p>8 Q Does the Proctor & Gamble diaper have a plastic</p> <p>9 layer edge?</p> <p>10 A Yes, it does.</p> <p>11 Q Does the soft padding member in the Proctor &</p> <p>12 Gamble diaper present a soft surface along at least a</p> <p>13 portion of the inside of the diaper waistband portion</p> <p>14 despite the plastic layer edge?</p> <p>15 A Despite the plastic layer edge?</p> <p>16 Q Yes.</p> <p>17 A Yes, it does.</p> <p>18 Q In the Proctor & Gamble diaper is the soft</p> <p>19 padding member parallel to the waistband?</p> <p>20 A Yes, it is.</p> <p>21 Q In the Proctor & Gamble diaper does the soft</p> <p>22 padding member provide an additional absorbent barrier</p> <p>23 against leakage?</p> <p>24 A Yes.</p>	<p style="text-align: right;">28</p> <p>1 A No.</p> <p>2 Q In the Proctor & Gamble diaper does the soft</p> <p>3 padding member present a soft surface at the inside of</p> <p>4 the diaper waistband?</p> <p>5 A Yes.</p> <p>6 Q In the Proctor & Gamble diaper does the padding</p> <p>7 member extend along an exposed surface of the waistband?</p> <p>8 A Again, Counsel. Does it extend along the</p> <p>9 exposed surface?</p> <p>10 Q Of the waistband, yes.</p> <p>11 A Yes, it does.</p> <p>12 Q In the Proctor & Gamble diaper does the padding</p> <p>13 member form a soft surface for contact with the skin of</p> <p>14 the individual at at least one of the border edges?</p> <p>15 A Yes, it does.</p> <p>16 Q I'd now like to hand you what's been marked as</p> <p>17 Defendant's Exhibit 6. Is this a letter you wrote to an</p> <p>18 examiner in the U.S. Patent Office in February of 1989?</p> <p>19 A Yes.</p> <p>20 Q Does your signature appear at the bottom of this</p> <p>21 letter?</p> <p>22 A Yes, it does.</p> <p>23 Q I'd like to direct your attention to the third</p> <p>24 paragraph from the end. There you say, and I quote.</p>
<p style="text-align: right;">27</p> <p>1 Q In the Proctor & Gamble diaper is the soft</p> <p>2 padding member located only along the waistband at the</p> <p>3 inside of the diaper?</p> <p>4 A Well, there are other soft padding members in</p> <p>5 the diaper.</p> <p>6 Q Let's talk about the blue soft padding member</p> <p>7 that you've mentioned to us that's in the waist area.</p> <p>8 Is that blue soft padding member located only along the</p> <p>9 waistband at the inside of the diaper?</p> <p>10 A Yes, it appears to be only at the waist -- Wait</p> <p>11 a minute. Excuse me, Counsel, I may have answered that</p> <p>12 too quickly. I just want to see how high this goes up.</p> <p>13 It goes not -- it not only goes from the</p> <p>14 waistband, which is right near the plastic edge, but it</p> <p>15 actually goes below the waist area. It goes about an</p> <p>16 inch below. I'm referring to this as being the</p> <p>17 waistband area and below here as well.</p> <p>18 Q Would it be correct to say that the blue soft</p> <p>19 padding member is located substantially only along the</p> <p>20 waistband at the inside of the diaper?</p> <p>21 A It's on the waist area and the abdomen area as</p> <p>22 well.</p> <p>23 Q So would it be substantially only along the</p> <p>24 waistband?</p>	<p style="text-align: right;">29</p> <p>1 "Huggies and Pampers are among the diaper companies that</p> <p>2 Mr. Van Epps searched that never contained any padding.</p> <p>3 My son used to get skin abrasions from the</p> <p>4 plastic waistband and leg areas. Now, Pampers and</p> <p>5 Huggies are padding those areas." Do you see that?</p> <p>6 A Yes, I do.</p> <p>7 Q Did you believe that to be a true statement when</p> <p>8 you wrote it in February of 1989?</p> <p>9 A Yes.</p> <p>10 Q Would you turn to the page that I've numbered 31</p> <p>11 down in the bottom right.</p> <p>12 A Okay.</p> <p>13 Q Is this a photocopy of the outside of a Huggies</p> <p>14 diaper package?</p> <p>15 A Yes.</p> <p>16 Q Did you buy this package of Huggies diapers</p> <p>17 before you sent your letter to the examiner on February</p> <p>18 10, 1989?</p> <p>19 A Yes.</p> <p>20 Q Did you buy this package of Huggies diapers here</p> <p>21 in the Chicago area?</p> <p>22 A Yes, I did.</p> <p>23 Q There's some handwriting on this page. Is that</p> <p>24 your handwriting?</p>

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<p style="text-align: right;">34</p> <p>1 another diaper. But it was also a separate strip.</p> <p>2 And this has more of a -- it's not foam. I'm</p> <p>3 not really sure exactly what that is, but it's</p> <p>4 definitely soft.</p> <p>5 Q Since I represent Kimberly-Clark, I was able to</p> <p>6 ask Kimberly-Clark to supply me with a Huggies diaper</p> <p>7 made in February of 1989. And I'm going to hand you</p> <p>8 that diaper now. It's been marked as Defendant's</p> <p>9 Exhibit 7A, with the representation to you that it was</p> <p>10 manufactured in February of 1989.</p> <p>11 Can you look at Defendant's Exhibit 7A and tell</p> <p>12 me whether that resembles the diaper referred to in your</p> <p>13 letter to the examiner, Defendant's Exhibit 6.</p> <p>14 A May I tear it apart?</p> <p>15 Q Sure.</p> <p>16 A Did you want to see this as well?</p> <p>17 MR. MANZO: You go ahead.</p> <p>18 THE WITNESS: Okay. Now you want me to compare this</p> <p>19 one with that one, is that what you're asking?</p> <p>20 MR. BAUMGARTNER: Q No. My question is, is</p> <p>21 Defendant's Exhibit 7A, as best you can recall it,</p> <p>22 identical to the diaper that you referred to in your</p> <p>23 letter to the examiner which has been marked as</p> <p>24 Defendant's Exhibit 6?</p>	<p style="text-align: right;">36</p> <p>1 to the examiner, Defendant's Exhibit 6?</p> <p>2 A I would say it's very close to that, yes.</p> <p>3 Q And you can't point to any differences sitting</p> <p>4 here today?</p> <p>5 A Not going that far back.</p> <p>6 Q All right. Let me ask you some questions about</p> <p>7 Defendant's Exhibit 7A, and if you'd like to refer to</p> <p>8 the diaper in connection with each question, please feel</p> <p>9 free to do that.</p> <p>10 Can you just confirm for us that Defendant's</p> <p>11 Exhibit 7A has a soft padding member?</p> <p>12 A Yes, it does.</p> <p>13 Q And that would be in the waist region?</p> <p>14 A It's in the waistband.</p> <p>15 Q And can you describe the soft padding member for</p> <p>16 us?</p> <p>17 A The soft padding member is right in between the</p> <p>18 top lining, or the bat. It's adjacent to the plastic</p> <p>19 edge, and it sits in between the back covering of</p> <p>20 plastic and in between the top batting portion.</p> <p>21 Q Is the soft padding member in Defendant's</p> <p>22 Exhibit 7A formed from a soft substance?</p> <p>23 A Yes, it is.</p> <p>24 Q Does the soft padding member present a soft</p>
<p style="text-align: right;">35</p> <p>1 A I would say it's very similar.</p> <p>2 Q Are there any differences that you can point to</p> <p>3 sitting here today?</p> <p>4 A Differences between what?</p> <p>5 Q Defendant's Exhibit --</p> <p>6 A Between that diaper and what I'm referring to</p> <p>7 here?</p> <p>8 Q -- 7A and the diaper you had in your hands in</p> <p>9 February of 1989 when you wrote the letter to the</p> <p>10 examiner which is Defendant's Exhibit 6.</p> <p>11 A That was a long time ago, but, as I said</p> <p>12 earlier, Huggies made more than one kind of diaper that</p> <p>13 had separate strips within the waistband. That's the</p> <p>14 best answer I can give you.</p> <p>15 Q So you can't think of a difference sitting here</p> <p>16 today, but it's conceivable that there are some?</p> <p>17 A Some differences between the diapers that I was</p> <p>18 thinking of back then in 1989?</p> <p>19 Q And Defendant's Exhibit 7A, correct.</p> <p>20 A It appears -- to the best of my recollection, it</p> <p>21 had separate strips just like I'm seeing now before me</p> <p>22 today.</p> <p>23 Q So as best you can tell, Defendant's Exhibit 7A</p> <p>24 embodies the diapers that you had in 1989 when you wrote</p>	<p style="text-align: right;">37</p> <p>1 surface along at least a portion of the inside of the</p> <p>2 diaper waistband portion?</p> <p>3 A The waistband portion, yes.</p> <p>4 Q Does this diaper have a plastic layer edge?</p> <p>5 A Yes, it does.</p> <p>6 Q Does the soft padding member present a soft</p> <p>7 surface along at least a portion of the inside of the</p> <p>8 diaper waistband portion despite the plastic layer edge?</p> <p>9 A Yes.</p> <p>10 Q Now, can you tell me whether the soft padding</p> <p>11 member is different from the top sheet, made from a</p> <p>12 different piece of material?</p> <p>13 A Yes. Well, made from a different piece of</p> <p>14 material? I can't really say because I'm not an expert</p> <p>15 in all different types of materials, but it is soft.</p> <p>16 The top sheet is soft. And it could be made of</p> <p>17 something different. I just don't know that. But I</p> <p>18 know it is soft.</p> <p>19 Q I don't think I made my question clear. Putting</p> <p>20 aside whether the material that is used to make the top</p> <p>21 sheet is the same or different from the material used to</p> <p>22 make the soft padding member, is the soft padding member</p> <p>23 physically distinct from the top sheet?</p> <p>24 A Yes, it is.</p>

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<p style="text-align: right;">30</p> <p>1 A Yes.</p> <p>2 Q Can you read us what the handwriting says?</p> <p>3 A This area has extra padding/now lining I believe</p> <p>4 it to say.</p> <p>5 Q And what idea did you intend to convey when you</p> <p>6 wrote that?</p> <p>7 A I was trying to show that there was extra</p> <p>8 padding in the waistband.</p> <p>9 Q Did the Huggies diaper referred to in your</p> <p>10 letter to the examiner and shown in this picture that</p> <p>11 we've been looking at on the page numbered 31, did that</p> <p>12 Huggies diaper have a soft padding member?</p> <p>13 A Yes, it did.</p> <p>14 Q Where was the soft padding member located?</p> <p>15 A Inside the waistband.</p> <p>16 Q Can you describe the soft padding member as you</p> <p>17 recall it?</p> <p>18 A From what I remember, it was different than the</p> <p>19 Pampers. I believe at that time it was a more distinct</p> <p>20 strip. The strips not being identical, of course,</p> <p>21 referring to Pampers and Huggies.</p> <p>22 Q How did you know that the strip in the Huggies</p> <p>23 diaper was soft?</p> <p>24 A I tore it apart as well.</p>	<p style="text-align: right;">32</p> <p>1 Defendant's Exhibit 7. This, again, is one of the</p> <p>2 diapers that your counsel produced for us this morning.</p> <p>3 Can you tell us whether this is a sample of the</p> <p>4 Huggies diaper referred to in your letter to the</p> <p>5 examiner, Defendant's Exhibit 6?</p> <p>6 A This one's marked 1998. It seems very similar.</p> <p>7 And here is the extra padding member, the green piece</p> <p>8 here.</p> <p>9 No, not the green piece, excuse me. It is the</p> <p>10 white piece. Correction on there. In front of this</p> <p>11 green area.</p> <p>12 Q Now, Defendant's Exhibit 7 has got a little</p> <p>13 green piece of paper stapled to it that says Huggies</p> <p>14 1998. Do you know whose handwriting appears on that</p> <p>15 green sheet?</p> <p>16 A I have to look at it again. I believe it might</p> <p>17 be -- That is not mine. I do not write like that.</p> <p>18 Q Do you know where that green sheet of paper came</p> <p>19 from?</p> <p>20 A I'm not exactly --</p> <p>21 MR. MANZO: Don't all the diapers come with that?</p> <p>22 THE WITNESS: I'm not exactly sure. I can't</p> <p>23 remember who affixed this to the diaper.</p> <p>24 MR. BAUMGARTNER: Q But from looking at this diaper</p>
<p style="text-align: right;">31</p> <p>1 Q And you felt it?</p> <p>2 A Yes.</p> <p>3 Q And it felt soft to you?</p> <p>4 A It felt soft.</p> <p>5 Q How did you know that that strip was padding?</p> <p>6 A Because, as I said before, in the dictionary</p> <p>7 term you add something to provide padding. So it was</p> <p>8 clearly added in the waistband.</p> <p>9 Q Did it provide cushioning in the waist area?</p> <p>10 A Yes.</p> <p>11 Q Now, thinking back on the Huggies diaper</p> <p>12 referred to in your letter to the examiner, Defendant's</p> <p>13 Exhibit 6, is there any doubt in your mind that this</p> <p>14 diaper had the sort of soft padding member that you</p> <p>15 invented?</p> <p>16 A Is there any doubt that this particular diaper</p> <p>17 on page 31?</p> <p>18 Q Yes, correct.</p> <p>19 A I believe -- at the time I believe it to have</p> <p>20 the soft padding member.</p> <p>21 Q And sitting here today, is that still your</p> <p>22 belief?</p> <p>23 A Yes.</p> <p>24 Q I'm going to hand you what's been marked as</p>	<p style="text-align: right;">33</p> <p>1 your recollection would be that it has the same soft</p> <p>2 padding member that you saw in the diaper that you</p> <p>3 referred to in your letter to the examiner, Defendant's</p> <p>4 Exhibit 6?</p> <p>5 A Ask that again, Counsel.</p> <p>6 Q Does Defendant's Exhibit 7 have the same soft</p> <p>7 padding member that was contained in the Huggies diaper</p> <p>8 you referred to in your letter to the examiner,</p> <p>9 Defendant's Exhibit 6?</p> <p>10 A Oh, yes.</p> <p>11 Q Is there any difference that you can point to</p> <p>12 between the Huggies diaper, which is Defendant's Exhibit</p> <p>13 7, and the diaper, as you recall it, that is referred to</p> <p>14 in your letter to the examiner, Defendant's Exhibit 6?</p> <p>15 A Well, this appears to be very close to what I</p> <p>16 was referring to back then.</p> <p>17 Q Can you think of any differences between</p> <p>18 Defendant's Exhibit 7 and the diapers that you had in</p> <p>19 1989 when you wrote to the examiner?</p> <p>20 A There appear to be another Huggies diaper, and</p> <p>21 I'm not sure, you know, which one of your diapers it</p> <p>22 was, because you make several kinds, but it seemed like</p> <p>23 there might have been a little very soft foam strip as</p> <p>24 well, but I'm not exactly -- that could have been in</p>

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<p style="text-align: right;">38</p> <p>1 Q Is the soft padding member physically distinct</p> <p>2 from the back sheet?</p> <p>3 A Yes, it is.</p> <p>4 Q In the Huggies diaper, Defendant's Exhibit 7A,</p> <p>5 is the soft padding member parallel to the waistband?</p> <p>6 A Yes, it is.</p> <p>7 Q Does the soft padding member provide an</p> <p>8 additional absorbent barrier against leakage?</p> <p>9 A Yes.</p> <p>10 Q Is the soft padding member located only along</p> <p>11 the waistband at the inside of the diaper?</p> <p>12 A The soft padding member only located at the</p> <p>13 waistband? There is a soft padding member in between</p> <p>14 the leg areas. I just thought that was kind of a</p> <p>15 general question. Sorry.</p> <p>16 Q Let me ask it better. I see the ambiguity here</p> <p>17 you're concerned about.</p> <p>18 I'm talking now about the blue soft padding</p> <p>19 member in the waist region.</p> <p>20 A Yes.</p> <p>21 Q With respect to that, is that soft padding</p> <p>22 member located only along the waistband at the inside of</p> <p>23 the diaper?</p> <p>24 A Yes, it's only at the waistband.</p>	<p style="text-align: right;">40</p> <p>1 A As I said earlier, I was very unhappy that he</p> <p>2 filed an ornamental design as opposed to a utility</p> <p>3 patent application.</p> <p>4 Q Do you recall thinking that there was a problem</p> <p>5 with the design application because it did not indicate</p> <p>6 where the extra padding in your design was located?</p> <p>7 A I was not happy with the fact that there was no</p> <p>8 explanation that is provided through a design</p> <p>9 application as there is in a utility patent.</p> <p>10 Q Did you believe that your attorney should have</p> <p>11 indicated where the extra padding was located when he</p> <p>12 wrote the design application?</p> <p>13 A Well, as I said, in a design application that</p> <p>14 doesn't usually occur, and he and I did have a</p> <p>15 disagreement about that. But I wanted a filing date as</p> <p>16 soon as possible, so I went along with what he wanted to</p> <p>17 do.</p> <p>18 Q If you take a look at Defendant's Exhibit 6,</p> <p>19 which is this document right here I believe, if you look</p> <p>20 at the fourth paragraph, you write there "he" -- This is</p> <p>21 in reference to Mr. Van Epps, your attorney; is that</p> <p>22 correct?</p> <p>23 A I believe so.</p> <p>24 Q "He should have indicated where the extra</p>
<p style="text-align: right;">39</p> <p>1 Q Now, does that particular soft padding member in</p> <p>2 the waist region present a soft surface at the inside of</p> <p>3 the diaper waistband?</p> <p>4 A You said waist region. I consider region</p> <p>5 continuous space. This is in the waistband.</p> <p>6 Q So --</p> <p>7 A I would have to say region is one thing,</p> <p>8 waistband, to me, is another.</p> <p>9 Q The soft padding member that we're talking</p> <p>10 about, does that present a soft surface at the inside of</p> <p>11 the diaper waistband?</p> <p>12 A At the diaper waistband, yes.</p> <p>13 Q Does the padding member that we're talking about</p> <p>14 here extend along an exposed surface of the waistband?</p> <p>15 A Extend along the exposed surface?</p> <p>16 Q Yes.</p> <p>17 A Yes, it does.</p> <p>18 Q Does the padding member that we're talking about</p> <p>19 form a soft surface for contact with the skin of the</p> <p>20 individual at at least one of the border edges?</p> <p>21 A Yes.</p> <p>22 Q Did you ever think there was a problem with your</p> <p>23 design application because it did not indicate where the</p> <p>24 extra padding in your design was located?</p>	<p style="text-align: right;">41</p> <p>1 padding is located." Do you see that?</p> <p>2 A Yes.</p> <p>3 Q This is in reference to the design application</p> <p>4 that Mr. Van Epps wrote?</p> <p>5 A Right.</p> <p>6 Q Why did you believe that Mr. Van Epps should</p> <p>7 have indicated where the extra padding is located?</p> <p>8 A Because maybe I failed to mention in this letter</p> <p>9 that he should have filed the utility patent. Miss</p> <p>10 Stella Reed and I actually had a conversation, and she</p> <p>11 clearly let me know that it should have been a utility</p> <p>12 patent. So I was writing back to her explaining how I</p> <p>13 was upset with Mr. Van Epps.</p> <p>14 Q And one of the reasons you were upset was</p> <p>15 because, in your view, he should have indicated in the</p> <p>16 design application where the extra padding is located?</p> <p>17 A Well, maybe I didn't phrase it right in the</p> <p>18 letter, sir, but what I meant by this letter was that he</p> <p>19 basically should have filed a utility patent.</p> <p>20 Q Another concern you had was that you should have</p> <p>21 urged your patent lawyer to make a better drawing and/or</p> <p>22 give some detail in your design patent application; is</p> <p>23 that right?</p> <p>24 A Again, you know, design patent application I</p>

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<p style="text-align: right;">42</p> <p>1 realize doesn't provide any explanation.</p> <p>2 Q Any explanation of what?</p> <p>3 A Of the diaper and the different features of the</p> <p>4 diaper.</p> <p>5 Q And that was true of your design patent</p> <p>6 application?</p> <p>7 A Yes.</p> <p>8 Q I'm going to hand you a piece of sandpaper,</p> <p>9 which I've marked as Defendant's Exhibit 10. Now, the</p> <p>10 piece of sandpaper has a paper side and an abrasive</p> <p>11 side. Would you consider either side to be soft?</p> <p>12 A No.</p> <p>13 Q Would you consider this piece of sandpaper to</p> <p>14 provide padding on either side?</p> <p>15 A That depends. It depends on what you're trying</p> <p>16 to provide padding for I would think.</p> <p>17 Q Well, let's suppose we're trying to provide</p> <p>18 padding for the waistband of a disposable diaper worn by</p> <p>19 infants.</p> <p>20 A You wouldn't put in sandpaper.</p> <p>21 Q So this piece of sandpaper would not provide</p> <p>22 padding in that content?</p> <p>23 A No, it would not.</p> <p>24 Q Do you consider this piece of sandpaper to be</p>	<p style="text-align: right;">44</p> <p>1 bag that I borrowed from my wife this morning. I guess</p> <p>2 she's not going to get it back. But it's just a regular</p> <p>3 plastic garbage bag.</p> <p>4 Would you consider the surface of this plastic</p> <p>5 garbage bag to be soft?</p> <p>6 A It's somewhat soft.</p> <p>7 Q And how do you know it's soft?</p> <p>8 A By touching it.</p> <p>9 Q And what is it when you touch it that tells you</p> <p>10 it's soft?</p> <p>11 A By the way it feels.</p> <p>12 Q Would you consider the plastic garbage bag to</p> <p>13 provide padding?</p> <p>14 A It could.</p> <p>15 Q Would it provide padding in the context of a</p> <p>16 waist in a disposable diaper?</p> <p>17 A It could.</p> <p>18 Q Would you consider the plastic garbage bag to be</p> <p>19 brittle?</p> <p>20 A No.</p> <p>21 Q Would you consider the plastic garbage bag to be</p> <p>22 hard?</p> <p>23 A No.</p> <p>24 Q Is it true that a material like the plastic used</p>
<p style="text-align: right;">43</p> <p>1 brittle?</p> <p>2 A Brittle?</p> <p>3 Q Yes.</p> <p>4 A Somewhat.</p> <p>5 Q Would you consider this piece of sandpaper to be</p> <p>6 hard?</p> <p>7 A Hard? I would say stiff.</p> <p>8 Q You wouldn't say hard?</p> <p>9 A Not as hard as the table, but stiff.</p> <p>10 Q Can you fold this piece of sandpaper?</p> <p>11 A Yes.</p> <p>12 Q So it would be correct to say that this piece of</p> <p>13 sandpaper is capable of curvature?</p> <p>14 A Yes.</p> <p>15 Q Now, it would be possible to attach a strip of</p> <p>16 sandpaper to the waist region of a diaper, correct?</p> <p>17 A It would be possible?</p> <p>18 Q Yes.</p> <p>19 A Yes.</p> <p>20 Q And one could wrap the strip of sandpaper from</p> <p>21 the inside to the outside of the diaper?</p> <p>22 A Yes.</p> <p>23 Q I'm going to hand you what's been marked as</p> <p>24 Defendant's Exhibit 11. This is just a plastic garbage</p>	<p style="text-align: right;">45</p> <p>1 in this garbage bag has been used to make the outer</p> <p>2 cover of disposable diapers?</p> <p>3 A It's very similar, yes.</p> <p>4 Q Now if you feel the edge of the plastic garbage</p> <p>5 bag, is the edge soft?</p> <p>6 A Somewhat.</p> <p>7 Q Would you consider that edge to be abrasive?</p> <p>8 A It depends on what you would affix to that edge.</p> <p>9 It might become abrasive if you were to affix elastic to</p> <p>10 it. Then it might be abrasive then.</p> <p>11 Q Now, this plastic garbage bag is capable of</p> <p>12 curvature; is that correct?</p> <p>13 A Yes.</p> <p>14 Q It would be possible to attach a strip of the</p> <p>15 garbage bag material to the waist region of a diaper,</p> <p>16 correct?</p> <p>17 A Yes.</p> <p>18 Q One could wrap the strip of garbage bag material</p> <p>19 from the inside to the outside of the diaper?</p> <p>20 A Yes.</p> <p>21 Q If one wrapped the strip of garbage bag material</p> <p>22 from the inside to the outside of the diaper in the</p> <p>23 waist region, would it provide padding?</p> <p>24 A It could.</p>

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<p style="text-align: right;">46</p> <p>1 Q Would it provide a cushion effect?</p> <p>2 A It could.</p> <p>3 Q Do you know what -- Strike that. We've talked</p> <p>4 about what a diaper liner is.</p> <p>5 A Uh-huh.</p> <p>6 Q In your experience as a diaper designer, is</p> <p>7 diaper liner material always soft?</p> <p>8 A Is diaper liner material always soft? I would</p> <p>9 say now they've made great improvements and they're more</p> <p>10 careful with the materials they use.</p> <p>11 Q Was there a time when -- Strike that. Have you</p> <p>12 ever felt diaper liner material that was not soft?</p> <p>13 A When it became more abrasive is when it was</p> <p>14 affixed to elastic, bringing the threads and the fibers</p> <p>15 closer together, giving it a rougher surface.</p> <p>16 Q And when is the last time you touched diaper</p> <p>17 liner material that you thought was not soft?</p> <p>18 A The last time when I thought it was not soft?</p> <p>19 Back in 1986 when I came up with the idea to add extra</p> <p>20 padding.</p> <p>21 Q Was there a particular product that had diaper</p> <p>22 liner material that was not soft?</p> <p>23 A A particular product? Yes, I believe it was</p> <p>24 Pampers at that time.</p>	<p style="text-align: right;">48</p> <p>1 whether it did or did not?</p> <p>2 A Make it soft? Or provide padding you're saying?</p> <p>3 Q Provide padding, yes.</p> <p>4 A I imagine if it wasn't present at all, it</p> <p>5 wouldn't provide any padding.</p> <p>6 Q If the material was present and it had the</p> <p>7 finish of diaper liner material, would it provide</p> <p>8 padding?</p> <p>9 A Yes, because, again, as I said, to pad is to add</p> <p>10 something.</p> <p>11 Q Let me hand you what's been marked as</p> <p>12 Defendant's Exhibit 8. Can you take a look at this</p> <p>13 diaper, and if you'd like to tear it apart, please feel</p> <p>14 free to do that. What I'd like you to do is tell me</p> <p>15 whether this diaper has a soft padding member.</p> <p>16 MR. MANZO: What exhibit number is that?</p> <p>17 MR. BAUMGARTNER: It is exhibit, beg your pardon, 8.</p> <p>18 MR. MANZO: Thank you.</p> <p>19 THE WITNESS: Appears to have a soft padding member.</p> <p>20 MR. BAUMGARTNER: Q Can you describe for us what</p> <p>21 you believe the soft padding member to be?</p> <p>22 A Well, once you take a soft piece of material,</p> <p>23 such as this is, it's not hard, and then you also add</p> <p>24 another piece of material to it, it becomes soft.</p>
<p style="text-align: right;">47</p> <p>1 Q And was the diaper liner material not soft in a</p> <p>2 certain region of the diaper or throughout the area</p> <p>3 where the diaper liner material could be touched?</p> <p>4 A It was not particularly soft in the waistband</p> <p>5 area where I felt it should have been softer.</p> <p>6 Q Let me ask you to look once more at -- Strike</p> <p>7 that.</p> <p>8 If a material has the finish of diaper liner</p> <p>9 material -- Do you understand what that means?</p> <p>10 A Diaper liner material?</p> <p>11 Q Yes.</p> <p>12 A Yes.</p> <p>13 Q You understand what it means to talk about a</p> <p>14 material having a certain finish?</p> <p>15 A Uh-huh.</p> <p>16 Q Yes?</p> <p>17 A Yes.</p> <p>18 Q If material has the finish of diaper liner</p> <p>19 material, will it provide padding?</p> <p>20 A It could.</p> <p>21 Q And when you say it could, what do you mean?</p> <p>22 A It could. It's not limited to thickness</p> <p>23 necessarily.</p> <p>24 Q What would be the factors that would affect</p>	<p style="text-align: right;">49</p> <p>1 Q So the soft padding member is a material that is</p> <p>2 between the top sheet and the back sheet in the waist</p> <p>3 region and it has vertical lines of perforations?</p> <p>4 A Well, I would -- the perforations, if this stood</p> <p>5 by itself without this material to it, it could be</p> <p>6 rougher as you could see because of the holes. But</p> <p>7 because this is affixed to it, it makes it soft.</p> <p>8 Q But the material with the holes is what you</p> <p>9 would consider the soft padding member?</p> <p>10 A Yes, it's the padding member.</p> <p>11 Q In Defendant's Exhibit 8, is the soft padding</p> <p>12 member that we've been discussing physically distinct</p> <p>13 from the top sheet?</p> <p>14 A Yes, the material on the inside seems to be</p> <p>15 physically distinct.</p> <p>16 Q Is the soft padding member we've been discussing</p> <p>17 physically distinct from the back sheet?</p> <p>18 A May I see that one more time, Edward? Thank</p> <p>19 you.</p> <p>20 Yes, it's distinct from the back sheet as well.</p> <p>21 Q Is there any doubt in your mind that this diaper</p> <p>22 has the sort of soft padding member that you invented?</p> <p>23 A I think it does.</p> <p>24 Q Is the soft padding member we've been discussing</p>

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<p style="text-align: right;">50</p> <p>1 formed from a soft substance?</p> <p>2 A Yes.</p> <p>3 Q Does a soft padding member present a soft</p> <p>4 surface along at least a portion of the inside of the</p> <p>5 diaper waistband portion?</p> <p>6 A Yes.</p> <p>7 Q Does this diaper have a plastic layer edge?</p> <p>8 A Yes.</p> <p>9 Q Does the soft padding member in this diaper</p> <p>10 present a soft surface along at least a portion of the</p> <p>11 inside of the diaper waistband portion despite the</p> <p>12 plastic layer edge?</p> <p>13 A Yes.</p> <p>14 Q In this diaper is the soft padding member</p> <p>15 parallel to the waistband?</p> <p>16 A Yes.</p> <p>17 Q In this diaper does the soft padding member</p> <p>18 provide an additional absorbent barrier against leakage?</p> <p>19 A Yes.</p> <p>20 Q In this diaper is the soft padding member</p> <p>21 located only along the waistband at the inside of the</p> <p>22 diaper?</p> <p>23 A Only at the waistband? It appears to be only on</p> <p>24 the waistband.</p>	<p style="text-align: right;">52</p> <p>1 A Uh-huh.</p> <p>2 Q You understand that at the end of the patent are</p> <p>3 a series of numbered paragraphs called claims?</p> <p>4 A Yes.</p> <p>5 MR. MANZO: Counsel, we've been going about an hour.</p> <p>6 In your transition to another topic, would it be</p> <p>7 appropriate for a break at this point?</p> <p>8 MR. BAUMGARTNER: Certainly.</p> <p>9 THE VIDEOGRAPHER: Off the record 11:09.</p> <p>10 (Recess was taken.)</p> <p>11 THE VIDEOGRAPHER: On the record 11:26.</p> <p>12 MR. BAUMGARTNER: Q I'm going to hand you</p> <p>13 Defendant's Exhibit 7 once again. Can you tell me</p> <p>14 whether this exhibit has soft padding members located</p> <p>15 along the leg holes to provide a soft surface at the leg</p> <p>16 holes?</p> <p>17 A No.</p> <p>18 Q Let me hand you Defendant's Exhibit 7A. Does</p> <p>19 Defendant's Exhibit 7A have soft padding members located</p> <p>20 along the leg holes to provide a soft surface at the leg</p> <p>21 holes?</p> <p>22 A No.</p> <p>23 Q Let me hand you Defendant's Exhibit 8. Does</p> <p>24 that have soft padding members located along the leg</p>
<p style="text-align: right;">51</p> <p>1 Q In this diaper does the soft padding member</p> <p>2 present a soft surface at the inside of the diaper</p> <p>3 waistband?</p> <p>4 A Yes.</p> <p>5 Q Does the padding member extend along an exposed</p> <p>6 surface of the waistband?</p> <p>7 A Yes.</p> <p>8 Q Can you explain for us why that is?</p> <p>9 A Well, here's your exposed surface, and it</p> <p>10 extends inside of that exposed surface, right up here to</p> <p>11 the edge.</p> <p>12 Q So the exposed surface is the very top of the</p> <p>13 waistband?</p> <p>14 A Well, yes. The exposed area, of course, comes</p> <p>15 all the way up to the edge, as well as the inside</p> <p>16 padding member does.</p> <p>17 Q In this diaper does the padding member form a</p> <p>18 soft surface for contact with the skin of the individual</p> <p>19 at at least one of the border edges?</p> <p>20 A Yes.</p> <p>21 Q I'd like to ask you to look again now at</p> <p>22 Defendant's Exhibit 1, which is the --</p> <p>23 A Yes,</p> <p>24 Q -- patent you have filed suit on.</p>	<p style="text-align: right;">53</p> <p>1 holes to provide a soft surface at the leg holes?</p> <p>2 A No.</p> <p>3 Q Let me hand you Defendant's Exhibit 9. Does</p> <p>4 that have soft padding members located along the leg</p> <p>5 holes to provide a soft surface at the leg holes?</p> <p>6 A No.</p> <p>7 Q Let me hand you Defendant's Exhibit 12. Does</p> <p>8 that have soft padding members located along the leg</p> <p>9 holes to provide a soft surface at the leg holes?</p> <p>10 A Yes.</p> <p>11 Q And what is the soft padding member located</p> <p>12 along the leg holes that provides --</p> <p>13 A May I -- Okay.</p> <p>14 Q -- a soft surface at the leg holes?</p> <p>15 A In this portion there is no extra padding.</p> <p>16 There is an extra layer that's not affixed to it, but</p> <p>17 it's --</p> <p>18 Q You're referring to the elasticized flap</p> <p>19 that's --</p> <p>20 A Yes.</p> <p>21 Q -- colored blue?</p> <p>22 A That does touch the leg hole area.</p> <p>23 Q You believe that elasticized flap that's colored</p> <p>24 blue is located along the leg holes?</p>

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<p style="text-align: right;">54</p> <p>1 A Yes.</p> <p>2 Q And you believe it provides a soft surface at</p> <p>3 the leg holes?</p> <p>4 A Yes.</p> <p>5 Q Let's go back to Defendant's Exhibit 7A. Does</p> <p>6 that have a padding member that is adjacent to and does</p> <p>7 not overlap the absorbent core of the diaper?</p> <p>8 A Adjacent to and does not overlap? Well, it</p> <p>9 doesn't seem to overlap.</p> <p>10 Q And you know what I mean when I say the</p> <p>11 absorbent core of the diaper?</p> <p>12 A Yes, I do.</p> <p>13 Q That's the area that has fluff padding and</p> <p>14 currently absorbent material that absorbs the liquid</p> <p>15 body exudates from the baby?</p> <p>16 A Yes.</p> <p>17 Q Let me hand you Defendant's Exhibit 8. In</p> <p>18 Defendant's Exhibit 8 is the padding member adjacent to</p> <p>19 the absorbent core?</p> <p>20 A Which padding member are you speaking of?</p> <p>21 Q The one in the waist area.</p> <p>22 A Is it adjacent to the absorbent core?</p> <p>23 Q Yes.</p> <p>24 A It's just above the adjacent core.</p>	<p style="text-align: right;">56</p> <p>1 Q Would it be correct to say that the padding</p> <p>2 member is adjacent to the absorbent core?</p> <p>3 A Is it next to it?</p> <p>4 Q Yes.</p> <p>5 MR. MANZO: Objection. Are you using the word</p> <p>6 adjacent as it's used in the claims or in normal English</p> <p>7 parlance or something different?</p> <p>8 MR. BAUMGARTNER: Q Just normal English parlance</p> <p>9 for the moment.</p> <p>10 A Well, if you stand next to a desk -- if there's</p> <p>11 like two people standing next to a desk, you're adjacent</p> <p>12 to it. If you're above it, are you really adjacent to</p> <p>13 it? I would say it's not directly adjacent to it. It's</p> <p>14 above it.</p> <p>15 Q All right. Is it true that the padding member</p> <p>16 in Defendant's Exhibit 7 does not overlap the absorbent</p> <p>17 core?</p> <p>18 A It does not overlap.</p> <p>19 Q All right. Let me hand you Defendant's Exhibit</p> <p>20 8. Is the padding member in that diaper adjacent to the</p> <p>21 absorbent core?</p> <p>22 A Again, it's above the absorbent core. Here's</p> <p>23 the absorbent core, and it's just above it.</p> <p>24 Q Well, the distance is about a quarter-of-an-inch</p>
<p style="text-align: right;">55</p> <p>1 Q Just above the absorbent core?</p> <p>2 A Yes.</p> <p>3 Q Does the padding member overlap the absorbent</p> <p>4 core?</p> <p>5 A Does the padding member overlap it?</p> <p>6 Q Yes.</p> <p>7 A No.</p> <p>8 Q Let me hand you -- let me hand you Defendant's</p> <p>9 Exhibit 7. Is the padding member in the waist region in</p> <p>10 Defendant's Exhibit 7 adjacent to the absorbent core?</p> <p>11 A Again, you keep saying region. I'm not going to</p> <p>12 agree that it's in the waist region. It's in the</p> <p>13 waistband.</p> <p>14 Q Let me restate the question --</p> <p>15 A Okay.</p> <p>16 Q -- and try to avoid that issue.</p> <p>17 A Okay.</p> <p>18 Q Is the padding member in the waist area adjacent</p> <p>19 to the absorbent core?</p> <p>20 A It's in the waistband portion above the adjacent</p> <p>21 core.</p> <p>22 Q So it's adjacent to the absorbent core?</p> <p>23 A I'm sorry, I said it's in the waistband area.</p> <p>24 Above the core is what I meant to say.</p>	<p style="text-align: right;">57</p> <p>1 from the top of the absorbent core and the bottom of the</p> <p>2 padding member; is that correct?</p> <p>3 A That's right.</p> <p>4 Q And if something is a quarter-of-an-inch apart,</p> <p>5 you would say it's not adjacent to it?</p> <p>6 A Well, as I said earlier, if you're above it, are</p> <p>7 you really adjacent to it? I would have to say you have</p> <p>8 to be directly next to it to be adjacent to it.</p> <p>9 Q So it has to be touching?</p> <p>10 MR. MANZO: Objection, argumentative.</p> <p>11 THE WITNESS: So it has to be touching? No, you</p> <p>12 don't have to be touching.</p> <p>13 MR. BAUMGARTNER: Q Can you give me some idea of</p> <p>14 how far apart something has to be in order not to be</p> <p>15 adjacent?</p> <p>16 A I see what you're saying. Again, I don't know</p> <p>17 if you can distinguish if something is above it if it's</p> <p>18 really adjacent to it. I picture adjacent being next to</p> <p>19 it, which is different than being above it.</p> <p>20 Q Well, my pen is sitting --</p> <p>21 A It's like spacial concepts when you're teaching</p> <p>22 children; above, below, side.</p> <p>23 Q My pen is above the desk when it sits on the</p> <p>24 desk. Isn't it true --</p>

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<p style="text-align: right;">58</p> <p>1 A It's on top, yes.</p> <p>2 Q Isn't it true my pen is adjacent to the desk?</p> <p>3 A I can only answer it the same way I've answered</p> <p>4 it previously.</p> <p>5 Q You wouldn't consider that to be adjacent?</p> <p>6 A It's on top of the desk.</p> <p>7 Q All right. And it would not be adjacent to the</p> <p>8 desk as you use that term, or as you understand it?</p> <p>9 A As I'm visualizing the term adjacent, no.</p> <p>10 Q In Defendant's Exhibit 8 does the padding member</p> <p>11 overlap the absorbent core?</p> <p>12 A No, it does not.</p> <p>13 Q Let me hand you Defendant's Exhibit 9. Is the</p> <p>14 padding member in that product adjacent to the absorbent</p> <p>15 core?</p> <p>16 A Yes, it is.</p> <p>17 Q Does the padding member in that product overlap</p> <p>18 the absorbent core?</p> <p>19 A Yes, it does.</p> <p>20 Q Let me hand you what's been marked as</p> <p>21 Defendant's Exhibit 13.</p> <p>22 Can you tell me whether Defendant's Exhibit 13</p> <p>23 has soft padding members located along the leg holes to</p> <p>24 provide a soft surface at the leg holes?</p>	<p style="text-align: right;">60</p> <p>1 Q Yes.</p> <p>2 A I guess you could consider it a flap.</p> <p>3 Q And the elasticized flap you would view as a</p> <p>4 soft padding member?</p> <p>5 A This provides a soft surface.</p> <p>6 Q So it is a soft padding member?</p> <p>7 A I would say yes.</p> <p>8 Q And the soft padding member in Defendant's</p> <p>9 Exhibit 13 is located along the leg holes?</p> <p>10 A Yes.</p> <p>11 Q Would it be correct that the soft padding member</p> <p>12 located along the leg holes in Defendant's Exhibit 13</p> <p>13 provides a soft surface at the leg holes?</p> <p>14 A Yes.</p> <p>15 Q I'd like to now ask you to direct your attention</p> <p>16 to Defendant's Exhibit 1, which is the patent that is in</p> <p>17 dispute in this case.</p> <p>18 You understand that at the end of the patent</p> <p>19 are a series of numbered paragraphs called claims?</p> <p>20 A Yes.</p> <p>21 Q Would you take a look at claim 1.</p> <p>22 A Yes.</p> <p>23 Q You've read claim 1 before?</p> <p>24 A Yes.</p>
<p style="text-align: right;">59</p> <p>1 MR. MANZO: Counsel, can you identify Exhibit 13 for</p> <p>2 the record?</p> <p>3 MR. BAUMGARTNER: Q It's a diaper which has a taped</p> <p>4 landing zone with bears holding balloons. And the</p> <p>5 question is, does it have soft padding members located</p> <p>6 along the leg holes to provide a soft surface at the leg</p> <p>7 holes?</p> <p>8 A It has a soft layer, but it's not distinct.</p> <p>9 It's not separate. It sits on top of it as the diaper</p> <p>10 closes and once the leg is inside the diaper.</p> <p>11 Q Does it have a soft -- Strike that. Does it</p> <p>12 have soft padding members located along the leg holes to</p> <p>13 provide a soft surface at the leg holes?</p> <p>14 A There's some additional material there which can</p> <p>15 provide some padding, but as I said, it's not separate</p> <p>16 or distinct. But there is some extra material there</p> <p>17 once it is closed.</p> <p>18 If you're talking about this portion of the</p> <p>19 diaper, there is none. But once this lays on top of it,</p> <p>20 I would say that there is. I have to distinguish it</p> <p>21 that way.</p> <p>22 Q So, again, this diaper has got an elasticized</p> <p>23 flap next to the leg opening?</p> <p>24 A An elasticized flap?</p>	<p style="text-align: right;">61</p> <p>1 Q Would you say you're generally familiar with the</p> <p>2 terminology that's used in claim 1?</p> <p>3 A Yes.</p> <p>4 Q Claim 1 talks about a soft padding member. Do</p> <p>5 you see that?</p> <p>6 A Yes.</p> <p>7 Q In the diaper you invented is there a soft</p> <p>8 padding member?</p> <p>9 A Yes.</p> <p>10 Q What is the function of the soft padding member</p> <p>11 in the diaper you invented?</p> <p>12 A What is the soft padding member?</p> <p>13 Q No. The question is, what is the function of</p> <p>14 the soft padding member?</p> <p>15 A Oh, it's to provide padding, and you could say</p> <p>16 even a little bit of cushioning, but it's not limited to</p> <p>17 thickness.</p> <p>18 If you look up in the dictionary, pad supports</p> <p>19 cushion, cushion supports the word pad. It's a separate</p> <p>20 strip located in the waistband specifically and is</p> <p>21 distinct, meaning it is separate, from the other</p> <p>22 portions of the waistband.</p> <p>23 Q In your invention why does the soft padding</p> <p>24 member have to be soft?</p>

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<p style="text-align: right;">62</p> <p>1 A Because you would not put anything hard in a 2 baby diaper. 3 Q And that's because you don't want to abrade the 4 baby's skin? 5 A Correct. 6 Q Now, in the Pampers product that had the liner 7 material that was not soft -- 8 A Right. 9 Q -- in your experience, did that cause skin 10 abrasion to babies? 11 A At that time -- Yes. Just to answer your 12 question, yes. 13 Q Now, in your invention how does the soft padding 14 member provide padding? 15 A Because, as I said, it's a separate strip that 16 provides comfort or cushioning, not limited to 17 thickness, making it more comfortable to the wearer. 18 Q Now, you said that the soft padding member can 19 provide padding and it's not limited to thickness. Can 20 you explain a little what you mean? 21 A Not limited to any specific size dimension, such 22 as, you know, if you want to just say quarter-of-an-inch 23 or an eighth-of-an-inch. It's not specific as to what 24 thickness it's supposed to be.</p>	<p style="text-align: right;">64</p> <p>1 whether that material was soft or not? 2 MR. MANZO: Could I have that question read back, 3 please. 4 (Record read.) 5 THE WITNESS: Are you speaking of the material I'm 6 referring to in my patent, or in the abrasions that I 7 was speaking of back in -- 8 MR. BAUMGARTNER: Q No, just any material. Let's 9 suppose we give them -- there's a panel of 10 diaper 10 designers. We give them a material and we say is this 11 material soft? And then maybe we give them another 12 material and we say is this material soft, and we do 13 this for 10 different materials. 14 Is it your expectation that for each material 15 all 10 diaper designers would reach the same conclusion 16 after feeling the material? 17 A They may not reach the same conclusion. 18 Q Why do you say that? 19 A Well, just depends on I guess their tactile 20 sensation of the particular material they're feeling. 21 Q And that's going to differ -- 22 A They may say this is a little soft, but it's 23 stiff, it's not appropriate for a baby diaper. I think 24 that's too broad of a question.</p>
<p style="text-align: right;">63</p> <p>1 Q Now in order for something to provide padding, 2 does it have to have resiliency in the sense that you 3 could press down on it and it will give? 4 A I'm not so sure if -- I would think it would 5 have some give to it, but not always. 6 Q So you can envision materials that would provide 7 padding and wouldn't have give? 8 A Let me think about that for a moment. Yes. A 9 situation in my Jeep, my leather seats happen to be very 10 hard. There is padding in there. And it really doesn't 11 have a lot of give to it. It appears to be very firm 12 when you sit on it. 13 Q Now, if a person is a diaper designer and 14 looking at a particular material, how can that person 15 tell whether that material is soft as that word is used 16 in your patent? 17 A Well, by tactile sensation is how you know it's 18 soft. 19 Q What do you look for? 20 A Smoothness, soft, sort of -- comfortable I guess 21 is a good word for padding. 22 Q Is it your expectation that if the same material 23 were given to 10 different diaper designers back in the 24 late 1980s, that they would all be of one opinion as to</p>	<p style="text-align: right;">65</p> <p>1 Q The tactile sensation of one person might be 2 different from the tactile sensation -- 3 A For different reasons. Like I said, it may not 4 have applicability to these diaper people or experts or 5 who you're referring to. 6 Q You need to let me finish my question or the 7 poor court reporter doesn't make a complete record. So 8 let me just try that again if I could. 9 A Okay. 10 Q Is it the case that different diaper scientists 11 will have different degrees of tactile sensation so that 12 one scientist could feel a material and say, well, this 13 is on the borderline, but I wouldn't call this soft, and 14 another person could feel the material and say, well, 15 this is on the borderline, but I would say it is soft? 16 MR. MANZO: Objection, calls for speculation. 17 THE WITNESS: I still think that you could have 18 varying degrees of what is soft or what isn't. But I 19 would have to say that they should come to the same 20 conclusion that it would be soft, which is appropriate 21 for a baby diaper. 22 MR. BAUMGARTNER: Q So if you gave the 10 diaper 23 designers 10 different materials, you think they would 24 be able to agree on each material as to whether it was</p>

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<p style="text-align: right;">66</p> <p>1 soft or not?</p> <p>2 A I will say that they should be able to agree if</p> <p>3 it's soft. They may have some other factors to it, but</p> <p>4 I would have to say they may agree that it's soft.</p> <p>5 Q They may agree. Is it possible they could</p> <p>6 disagree?</p> <p>7 A I guess it depends on the material.</p> <p>8 Q Can you think of a material that a diaper</p> <p>9 designer might have trouble telling whether it was soft</p> <p>10 or not or that the different diaper designers might</p> <p>11 disagree on?</p> <p>12 A Can I think of one? I do know that not all</p> <p>13 polyurethane foams are not always soft. Some are harder</p> <p>14 than others.</p> <p>15 Q So there might be a poly-foam material which one</p> <p>16 diaper designer would say is soft and another diaper</p> <p>17 designer would say after he felt it --</p> <p>18 A Was not soft enough.</p> <p>19 Q -- was not soft enough?</p> <p>20 A Possibly.</p> <p>21 Q Do you think that the scientists at Proctor &</p> <p>22 Gamble who came up with the diaper liner material that</p> <p>23 you believed was not soft would have shared your view?</p> <p>24 MR. MANZO: Objection, presupposes that it was</p>	<p style="text-align: right;">68</p> <p>1 diaper material after it had been incorporated into a</p> <p>2 diaper in order to tell whether, in that particular</p> <p>3 application, the material was soft or not?</p> <p>4 A We have to wait until it's completely assembled</p> <p>5 is what you're saying? No, you wouldn't have to wait I</p> <p>6 think until it's completely assembled.</p> <p>7 I think you would have to have some foresight</p> <p>8 that maybe once it's mixed with other materials, it</p> <p>9 could possibly change the consistency of it. You would</p> <p>10 have to do that beforehand.</p> <p>11 Q So a material that was soft when you first felt</p> <p>12 it, after it was put into a diaper may no longer feel</p> <p>13 soft?</p> <p>14 A Depending on how it's manufactured.</p> <p>15 Q So depending on how it's manufactured, you could</p> <p>16 take a soft material and after it's in the diaper it</p> <p>17 would no longer be soft?</p> <p>18 A As I said, I'm just going to repeat, you</p> <p>19 could -- if you didn't have the foresight to envision</p> <p>20 what the outcome is going to be, yes, it could be harder</p> <p>21 or more abrasive than you anticipated if you didn't have</p> <p>22 the foresight to begin with.</p> <p>23 Q We've talked about the Proctor & Gamble diaper</p> <p>24 liner material which in the region of the elastics was</p>
<p style="text-align: right;">67</p> <p>1 scientists who came up with that.</p> <p>2 THE WITNESS: I would have to say, as I said</p> <p>3 earlier, just going back to once this material was</p> <p>4 interwoven in the elastic -- We know that elastic can be</p> <p>5 stiff, it can be somewhat abrasive. Once it was woven</p> <p>6 into that elasticized material, it was really not soft</p> <p>7 at that time, as soft as it should be for a baby diaper.</p> <p>8 MR. BAUMGARTNER: Q So it's not enough to feel a</p> <p>9 material before it's put into the diaper; you have to</p> <p>10 wait and have the diaper assembled and then feel it in</p> <p>11 order to --</p> <p>12 A You would have to because there's different</p> <p>13 factors that could change the outcome of it. Because if</p> <p>14 you're going to take a piece of elastic and say, well,</p> <p>15 gee, this feels kind of soft on the outside, but then</p> <p>16 you're weaving in different fibers and threads, it's</p> <p>17 going to change the feel of that particular piece of</p> <p>18 elastic.</p> <p>19 Q Once again, I didn't get my question all out.</p> <p>20 A Okay.</p> <p>21 Q So let me try again, and then we'll have a more</p> <p>22 coherent record.</p> <p>23 A Okay.</p> <p>24 Q Is it the case that you would need to feel a</p>	<p style="text-align: right;">69</p> <p>1 not soft in your view. Can you recall feeling any other</p> <p>2 material in a disposable diaper that you would say was</p> <p>3 not soft?</p> <p>4 A Other than the ones that I wanted to have</p> <p>5 changed back in '86, is that what you're referring to?</p> <p>6 Q Well, what are those? I'm not sure I know what</p> <p>7 you're talking about.</p> <p>8 A Well, I had a specific reason back then, as I</p> <p>9 explained earlier, because of the elastic in the diaper</p> <p>10 at the waistband.</p> <p>11 Q And which diaper was this?</p> <p>12 A As I said earlier, I believe it was Pampers at</p> <p>13 that time.</p> <p>14 Q And the elastic at the waistband made the liner</p> <p>15 material not soft?</p> <p>16 A Correct.</p> <p>17 Q And you wanted to fix that?</p> <p>18 A I did.</p> <p>19 Q Now, can you recall ever feeling any other</p> <p>20 material in a disposable diaper, other than the body</p> <p>21 side liner in the waist region in that Pampers diaper,</p> <p>22 which you felt was not soft?</p> <p>23 A I felt that in the leg hole areas it wasn't as</p> <p>24 soft as it should be for a baby. I felt it could use an</p>

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<p style="text-align: right;">70</p> <p>1 extra feature.</p> <p>2 Q And this was the Pampers diaper again or some</p> <p>3 other diaper?</p> <p>4 A I believe it was Pampers.</p> <p>5 Q And again --</p> <p>6 A To the best of my recollection. I'm sorry.</p> <p>7 Q This is back in 1986?</p> <p>8 A Yes.</p> <p>9 Q All right. Now, the leg hole area you said was</p> <p>10 not as soft as it could be. Would you have described</p> <p>11 that leg hole area as soft or not soft, or could you not</p> <p>12 say whether it was one or the other?</p> <p>13 A It was not soft.</p> <p>14 Q And you could tell that just by feeling it?</p> <p>15 A You felt mainly elastic when you felt it, yes.</p> <p>16 So it was not soft.</p> <p>17 Q How does one tell whether a particular part of a</p> <p>18 diaper provides padding or not?</p> <p>19 A How can you tell if it provides padding?</p> <p>20 Q Yes.</p> <p>21 A Because it has extra material, and, as I said</p> <p>22 earlier, the dictionary claims it could be -- it has to</p> <p>23 be comfortable. It's something that you add in order to</p> <p>24 pad something.</p>	<p style="text-align: right;">72</p> <p>1 (Whereupon, this concludes the confidential</p> <p>2 portion of the deposition.)</p> <p>3 MR. BAUMGARTNER: In my view, Mrs. Tracy's duty of</p> <p>4 disclosure to the Patent Office requires the prompt</p> <p>5 disclosure of this testimony to the Patent Office. And</p> <p>6 in fairness to you, Mrs. Tracy, I wanted to specifically</p> <p>7 mention this point so you could make a note of the need</p> <p>8 to send the examiner the material portions of this</p> <p>9 transcript after you receive a copy from the court</p> <p>10 reporter.</p> <p>11 And with that, I will pass the witness.</p> <p>12 MR. MANZO: To whom?</p> <p>13 MR. BAUMGARTNER: The next questioner.</p> <p>14 MS. ADDISON: I think I'm the next questioner, and I</p> <p>15 think we previously agreed at our last break this might</p> <p>16 be a convenient time for our noon recess.</p> <p>17 MR. MANZO: That's fine.</p> <p>18 THE VIDEOGRAPHER: Off the record 11:52. End of</p> <p>19 tape 1.</p> <p>20 (Lunch recess was taken.)</p> <p>21 THE VIDEOGRAPHER: This is tape 2, continuing</p> <p>22 deposition of Rhonda Tracy. Time is 1:05 on May 25.</p> <p>23 On the record.</p> <p>24 EXAMINATION</p>
<p style="text-align: right;">71</p> <p>1 Q So if you have extra material and it's</p> <p>2 comfortable --</p> <p>3 A Yes.</p> <p>4 Q -- that's padding?</p> <p>5 A It could be, yes.</p> <p>6 Q Can you think of a case where you would have</p> <p>7 extra material, it would be comfortable, and it's not</p> <p>8 padding?</p> <p>9 A You would have extra material and it's</p> <p>10 comfortable? No, because in padding I believe you have</p> <p>11 to add something.</p> <p>12 Q So if you have extra material and if it's</p> <p>13 comfortable, then you have padding?</p> <p>14 A As the dictionary describes it, I believe that's</p> <p>15 the way it is.</p> <p>16 MR. BAUMGARTNER: Have you ever felt a soft</p> <p>17 material -- Strike that. I believe my time is just</p> <p>18 about up, so I'm going to pass the witness.</p> <p>19 (Whereupon, the following portion of the</p> <p>20 deposition has been designated confidential.)</p> <p>21 MR. BAUMGARTNER: Let me just observe, though, that</p> <p>22 some of the testimony given today is highly material to</p> <p>23 the pending patent application that's now before the</p> <p>24 U.S. Patent Office as serial No. 107643.</p>	<p style="text-align: right;">73</p> <p>1 by Ms. Addison:</p> <p>2 MS. ADDISON: Q Good afternoon, Miss Tracy. We</p> <p>3 were introduced this morning before the deposition</p> <p>4 began. You know I'm Linda Addison, and I'm representing</p> <p>5 Drypers in this case that has been brought by you</p> <p>6 against Drypers.</p> <p>7 A Yes.</p> <p>8 Q Miss Tracy, you understand that you are still</p> <p>9 under oath?</p> <p>10 A Yes.</p> <p>11 Q Okay. Have you ever given a deposition before?</p> <p>12 A Yes, I have.</p> <p>13 Q Even though we are sitting here informally in</p> <p>14 the offices of counsel for Kimberly-Clark, you</p> <p>15 understand that what you say today would have the same</p> <p>16 force and effect if you were saying it in the</p> <p>17 courthouse?</p> <p>18 A Yes, I do.</p> <p>19 Q Miss Tracy, as you know, I believe the Court has</p> <p>20 given the defendants time constraints for your</p> <p>21 deposition, and, therefore, we've agreed to share the</p> <p>22 time. And I think it's understood among all parties</p> <p>23 that we will not be taking a full and comprehensive</p> <p>24 deposition of you today.</p>

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<p style="text-align: right;">74</p> <p>1 A Okay.</p> <p>2 Q Because of that, I'm going to try -- partly</p> <p>3 because of that and partly because I don't ever like to</p> <p>4 cover -- replot old ground, I'm going to try very hard</p> <p>5 not to repeat or ask you questions that were covered by</p> <p>6 Mr. Baumgartner this morning.</p> <p>7 A Okay.</p> <p>8 Q Nevertheless, there are a few questions that he</p> <p>9 asked you that I would like to begin by following up on,</p> <p>10 and then I'll move into some other areas. All right?</p> <p>11 A Okay.</p> <p>12 Q Have you ever invented anything other than the</p> <p>13 patents that are the subject -- or the patent that is</p> <p>14 the subject of this lawsuit and the related patents?</p> <p>15 A No, I have not.</p> <p>16 Q Have you ever applied for any U.S. patents,</p> <p>17 other than the diaper patents, that are related to the</p> <p>18 patents in this suit?</p> <p>19 A No, I have not.</p> <p>20 Q You mentioned before lunch upon questioning by</p> <p>21 counsel for Kimberly-Clark that you and Mr. Van Epps,</p> <p>22 your first counsel, had a disagreement in that you</p> <p>23 wanted a utility patent -- I'm sorry, you wanted the</p> <p>24 utility patent and he wanted the design patent and that</p>	<p style="text-align: right;">76</p> <p>1 MR. MANZO: So if you could answer without invading</p> <p>2 the attorney-client privilege, or if you choose to waive</p> <p>3 the attorney-client privilege, go ahead.</p> <p>4 THE WITNESS: I first found out about the disclosure</p> <p>5 program -- you know, as my memory best serves me, I</p> <p>6 believe it was even on television at one point about a</p> <p>7 disclosure program. I'm not totally accurate about</p> <p>8 that.</p> <p>9 I do remember calling the Patent Office and</p> <p>10 making inquiries about the disclosure program. That was</p> <p>11 through no advice of any attorney.</p> <p>12 In conversations with the Patent Office I was</p> <p>13 then told, I believe, the differences in different</p> <p>14 patent applications, and I had conversations. But the</p> <p>15 disclosure program was something that I did completely</p> <p>16 on my own without the advice of any attorney.</p> <p>17 MS. ADDISON: Q Okay. When you are referring or</p> <p>18 when you use the phrase disclosure program, would you</p> <p>19 please tell us what you mean by that?</p> <p>20 A Well, on September 2, 1986, when I first came up</p> <p>21 with the patent idea, and I have affidavits that are</p> <p>22 signed and sworn to that, they're notarized, I had sent</p> <p>23 that into the Patent Office.</p> <p>24 And what they did with this disclosure program</p>
<p style="text-align: right;">75</p> <p>1 that was a subject of disagreement between you.</p> <p>2 A Yes, that's correct.</p> <p>3 Q How was it that you, a first-time inventor, knew</p> <p>4 the difference between a utility and design patent?</p> <p>5 A It was explained to me that there was a</p> <p>6 difference, in that utility means functional, which is</p> <p>7 what my diaper is. It's a functional design. And</p> <p>8 ornamental is completely different in appearance, and I</p> <p>9 knew that.</p> <p>10 And I have a particular interest -- I guess you</p> <p>11 could say that I've always been intrigued with patents,</p> <p>12 so to speak, because my mother had a friend who invented</p> <p>13 a different type of an eyeglass. And this is when I was</p> <p>14 a teenager. And I was always intrigued with her</p> <p>15 particular invention that she came up with.</p> <p>16 Q You said that it was explained to you there was</p> <p>17 a difference between utility and design patent.</p> <p>18 A Yes.</p> <p>19 Q Who was it that explained that to you?</p> <p>20 A I believe it was --</p> <p>21 MR. MANZO: I would caution the witness not to</p> <p>22 reveal the sum and substance of attorneys'</p> <p>23 conversations.</p> <p>24 THE WITNESS: Okay.</p>	<p style="text-align: right;">77</p> <p>1 is give it a date and, you know, a serial number, if you</p> <p>2 want to call it that, or some type of a number, that</p> <p>3 they have seen it, that it has passed through their</p> <p>4 office, and the date that they stamp it with I believe</p> <p>5 was the date that it left the mail room.</p> <p>6 But I had called the Patent Office myself to</p> <p>7 inquire about that disclosure program to begin with.</p> <p>8 Q And all that was before you first approached</p> <p>9 Mr. Van Epps?</p> <p>10 A Yes, correct.</p> <p>11 Q Before our noon recess, when you were talking</p> <p>12 about your disagreement with Mr. Van Epps, you indicated</p> <p>13 that you wanted a filing date as soon as possible.</p> <p>14 A Yes.</p> <p>15 Q Why was that?</p> <p>16 A Well, because the disclosure program, I know it</p> <p>17 gives you a date, but it doesn't give you a patent per</p> <p>18 se. So I knew that I had to have a patent application</p> <p>19 with some sort of a date on it in order to pursue</p> <p>20 getting a patent on what it was that I had invented.</p> <p>21 And without an application, I can't really rely</p> <p>22 completely on disclosure, you know, to give me a patent.</p> <p>23 Q But what was it that gave you a sense of urgency</p> <p>24 about getting a date as soon as possible?</p>

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1 A Just the knowledge that other inventions, if
2 they supersede that date, you know, then you're really
3 lost. So --

4 Q You were concerned that someone else would
5 either patent or begin practicing your invention?

6 A Correct, that someone eventually would think of
7 it before, you know, my date of filing.

8 Q Can you find, Miss Tracy, Exhibit 3, which is
9 your design application.

10 A Uh-huh.

11 Q Does Exhibit 3, which is the design application
12 that you've discussed this morning with counsel for
13 Kimberly-Clark, accurately represent what you invented?

14 A It represents what I had written on my
15 disclosure document back in 1986 that has since been
16 changed, as you know.

17 Q You're talking about the differences between the
18 '824 patent that's in suit here and the disclosure
19 document?

20 A The '824 patent has this feature, I believe. It
21 is included -- I don't have the exact number in front of
22 me, but I know it's included in that one as well. But
23 it's not a particular feature that we are suing on. The
24 claims, I mean, because we are suing under 1, 2, 9, 10,

80

1 Q And you're referring to claim 3 of the '824
2 patent?

3 A Yes, I am.

4 Q Okay. Leaving aside the '824 patent, and I'd
5 like to go back now to the filing date of your design
6 application, February 2, 1987, does this design
7 application accurately represent the subject of your
8 invention?

9 MR. MANZO: Objection, asked and answered. The
10 objection is to vagueness.

11 I mean, if you're asking whether this shows the
12 ornamental features of her invention, that's one
13 question. If you're asking her whether this shows the
14 utility features of her invention, that's another
15 question.

16 You could ask it any way you want, but as
17 stated, I object to the vagueness of the question.

18 MS. ADDISON: Q Leaving aside for a moment the
19 '824, were the designs reflected in Exhibit 3 that is
20 before us today accurate depictions of your invention as
21 of February 2, 1987?

22 A Yes.

23 Q This morning Mr. Baumgartner -- Baumgartner or
24 Baumgartner?

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1 14 and 15.

2 Q I'm just trying to understand your position.
3 Does -- and I didn't understand your answer. Does
4 Exhibit 3 accurately represent the subject of your
5 invention?

6 MR. MANZO: Objection, the question is vague as
7 to --

8 THE WITNESS: It represents one of the features of
9 my invention. I was told I had to answer even though
10 there's an objection.

11 MR. MANZO: You should probably wait until I finish
12 the objection.

13 THE WITNESS: I'm sorry. I'm sorry.

14 MS. ADDISON: Q Okay. And that feature that is --
15 and the feature that it represents is accurately
16 represented in Exhibit 3?

17 A Yes.

18 Q And what feature is that?

19 A Let me refresh my memory on the patent and the
20 claim.

21 Claim No. 3, the diaper of claim 2 wherein said
22 first strip wraps around from inside to the outside of
23 the waistband, which is what it does here. And also in
24 figure 1.

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1 MR. BAUMGARTNER: Baumgartner.

2 MS. ADDISON: Q I apologize if I have misstated
3 your name.

4 In a couple of places I'm going to repeat what
5 I believe is testimony you gave this morning. If I
6 mistake that, it is not my intention to, and I believe I
7 have taken it down accurately, but you feel free to
8 correct me if I'm mistaken. All right?

9 A Okay.

10 Q This morning in response to a question by
11 Mr. Baumgartner, he asked you with regard to Exhibit 3
12 whether anything in that design application indicated
13 that the padded member at the waistband was soft.

14 A Right.

15 Q And I wrote down that you answered nothing in
16 the text indicates that it is soft.

17 A In the design text, correct.

18 Q In the design text. Is there anything anywhere
19 in the design application that indicates that it is
20 soft?

21 A Not in written form. But as I said, it can be
22 implied because what you would want to design for a baby
23 would have to be soft and not hard.

24 Q All right. Nothing in the text -- you've

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<p style="text-align: right;">82</p> <p>1 already told us nothing in the text indicates that it</p> <p>2 was soft, correct?</p> <p>3 A That's right.</p> <p>4 Q Okay. And nothing in the pictures indicates</p> <p>5 that it's soft either, does it?</p> <p>6 A I can't really say that because my intention</p> <p>7 always was to imply that this is something soft, you</p> <p>8 know, for the baby.</p> <p>9 That was my intention. And it is added in a</p> <p>10 disposable diaper, therefore, I think you would conclude</p> <p>11 you wouldn't add anything hard to a disposable diaper.</p> <p>12 Q This morning with Mr. Baumgartner you gave an</p> <p>13 answer that said, I believe, that any padding added to a</p> <p>14 baby diaper can only be soft. Do you remember the</p> <p>15 answer that I'm referring to?</p> <p>16 A Did I state it in those exact words?</p> <p>17 Q Well, I don't want to swear to you that I did,</p> <p>18 and that's why we have our capable court reporter here.</p> <p>19 But in regard to an earlier discussion of</p> <p>20 Exhibit 3 and your discussion with padding -- your</p> <p>21 earlier discussion with Mr. Baumgartner with padding,</p> <p>22 you used something similar to that. Do you remember the</p> <p>23 series of questions and answer I'm talking about?</p> <p>24 A There were so many questions, but, yes,</p>	<p style="text-align: right;">84</p> <p>1 A There's padding within the embodiment. In mine</p> <p>2 there's padding also in the waistband and in the leg</p> <p>3 areas.</p> <p>4 Q Anything else?</p> <p>5 A That pretty much covers the diaper I think; the</p> <p>6 embodiment, the legs, and the waist.</p> <p>7 Q Miss Tracy, when you use the word soft as you've</p> <p>8 used it throughout the day and in your patent, what do</p> <p>9 you mean by soft?</p> <p>10 A Soft, it's comfortable.</p> <p>11 Q Are there any words used in the '824 patent</p> <p>12 claims that have anything other than their ordinary</p> <p>13 dictionary definitions?</p> <p>14 A Anything other than the ordinary dictionary</p> <p>15 definitions? I can't be sure of that.</p> <p>16 MR. MANZO: You're asking about all the claims as a</p> <p>17 group?</p> <p>18 MS. ADDISON: I'm talking about the claims at issue</p> <p>19 in this suit.</p> <p>20 MR. MANZO: Claims 1, 2, 9, 10, 14 and 15?</p> <p>21 MS. ADDISON: Yes.</p> <p>22 MR. MANZO: That's what she means. Go ahead.</p> <p>23 THE WITNESS: I'm just waiting for you to finish.</p> <p>24 MS. ADDISON: Q And let me tell you, I am really</p>
<p style="text-align: right;">83</p> <p>1 something in that nature.</p> <p>2 Q Okay. Something in the nature of any padding</p> <p>3 added to a baby diaper can only be soft?</p> <p>4 A Should only be soft.</p> <p>5 Q Should only be soft. What padding -- oh, I'm</p> <p>6 sorry, I think the words you used were any padding added</p> <p>7 to a baby diaper is commonly only soft.</p> <p>8 A Commonly.</p> <p>9 Q Commonly only soft. Does that sound familiar?</p> <p>10 Does that sound like something you said?</p> <p>11 A Perhaps.</p> <p>12 Q Do you agree with that?</p> <p>13 A More than likely it would be soft, yes, I would</p> <p>14 say that.</p> <p>15 Q Okay. What padding added to what diapers</p> <p>16 commonly are you talking about?</p> <p>17 A Padding to what diapers?</p> <p>18 Q When you stated as a general proposition -- all</p> <p>19 I'm trying to do now is understand an answer you gave</p> <p>20 Mr. Baumgartner.</p> <p>21 When you stated as a general proposition that</p> <p>22 any padding added to baby diapers is commonly only soft,</p> <p>23 to what padding added to what diapers are you referring</p> <p>24 to?</p>	<p style="text-align: right;">85</p> <p>1 not trying to trick you or be tricky.</p> <p>2 This morning in response to questions by</p> <p>3 Mr. Baumgartner you referred to dictionaries on a number</p> <p>4 of occasions.</p> <p>5 A Yes.</p> <p>6 Q And all I'm trying to find out is, are there any</p> <p>7 words that you used in the '824 patent that have some</p> <p>8 unusual meaning other than one would find in a</p> <p>9 dictionary?</p> <p>10 A Well, I think then it would be subject to</p> <p>11 paraphrasing if you don't really refer to the dictionary</p> <p>12 meaning of it. And we're not allowed to paraphrase or</p> <p>13 interpret any other prior arts or my artwork other than</p> <p>14 what it says.</p> <p>15 So I don't know if it's fair to say that -- you</p> <p>16 know, it could mean something different to you, but I</p> <p>17 refer to different words being literate through the</p> <p>18 dictionary expression because I think that's what we</p> <p>19 should when we're dealing with patents.</p> <p>20 Q Okay. I'll object as being nonresponsive.</p> <p>21 A Okay.</p> <p>22 Q My question, Miss Tracy, is, as you sit here</p> <p>23 today, when was the last time you read the '824 patent</p> <p>24 claims 1, 2, 9, 10, 14, 15?</p>

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<p style="text-align: right;">86</p> <p>1 A Yesterday.</p> <p>2 Q Do any of the terms contained in those claims</p> <p>3 have some unusual or uncommon meaning?</p> <p>4 A I don't believe that they do.</p> <p>5 Q Do they have the meaning that one would find in</p> <p>6 a dictionary?</p> <p>7 A I would think so.</p> <p>8 Q Okay. And throughout the day when you have</p> <p>9 referenced dictionary definitions that you've looked up,</p> <p>10 what dictionary or dictionaries were you using?</p> <p>11 A The college version, Random House publisher, the</p> <p>12 Webster's dictionary.</p> <p>13 Q Miss Tracy, I'd like to call your attention,</p> <p>14 please, to Exhibit 6 that you discussed this morning --</p> <p>15 A Okay.</p> <p>16 Q -- with counsel for Kimberly-Clark. That is the</p> <p>17 letter, the February 10, 1989 letter from you to Stella</p> <p>18 Reed.</p> <p>19 A Yes.</p> <p>20 Q This morning you indicated that you had a</p> <p>21 telephone conversation with Miss Reed in which she said</p> <p>22 your application should have been for a utility patent</p> <p>23 instead of a design patent.</p> <p>24 A That's correct.</p>	<p style="text-align: right;">88</p> <p>1 Q And when she told you that your application</p> <p>2 should have been filed for a utility patent --</p> <p>3 A Correct.</p> <p>4 Q -- instead of a design patent, for what reason</p> <p>5 was that?</p> <p>6 A For what reason?</p> <p>7 Q Yes. In other words -- I'm sorry, go on.</p> <p>8 A Well, based on what I was telling her about my</p> <p>9 patent, she says it should have been filed as a utility</p> <p>10 patent.</p> <p>11 Q In order for what?</p> <p>12 A Well, that was her reasons. I really can't</p> <p>13 interpret as to what she meant. I just took her</p> <p>14 literally as to what she said.</p> <p>15 And the conversation wasn't very long. It was</p> <p>16 rather brief. And those are the words that just stand</p> <p>17 out in my mind, that it should have been filed as a</p> <p>18 utility patent.</p> <p>19 Q But for what reason for it to have been -- she</p> <p>20 didn't tell you why she is saying a different type of</p> <p>21 patent application would have been better for you?</p> <p>22 A She didn't say it was going to guarantee me a</p> <p>23 patent, but just that it should have been filed as a</p> <p>24 utility patent.</p>
<p style="text-align: right;">87</p> <p>1 Q Was that conversation before or after you wrote</p> <p>2 your February 10, 1989 letter that is before us as</p> <p>3 Exhibit 6?</p> <p>4 A The conversation, I believe, to the best of my</p> <p>5 knowledge, took place prior to this letter. I was upset</p> <p>6 that the design application was rejected. I was upset</p> <p>7 with Mr. Van Epps, because I thought design application,</p> <p>8 you know, it just turned out the way I thought.</p> <p>9 So I called the Patent Office myself, talked to</p> <p>10 the examiner. She told me I would have to fire my</p> <p>11 attorney, release him as power of attorney, and I told</p> <p>12 her that I was indeed going to do that.</p> <p>13 And I had another conversation with her as</p> <p>14 well. I didn't have just one conversation. I believe</p> <p>15 we had two conversations.</p> <p>16 And then when I talked to her -- I'm sorry, I</p> <p>17 will further add that when I did release Mr. Van Epps as</p> <p>18 power of attorney, I had a conversation with her and</p> <p>19 asked her to please tell me, as the inventor, what was</p> <p>20 wrong with this design application.</p> <p>21 Q Okay. When she told -- when you say she told</p> <p>22 you you'd have to fire Mr. Van Epps, was that in order</p> <p>23 for her to be communicating with you directly?</p> <p>24 A Yes, correct.</p>	<p style="text-align: right;">89</p> <p>1 Q And she didn't tell you why?</p> <p>2 A I can't recall.</p> <p>3 Q And she didn't tell you what would have been</p> <p>4 accomplished had it been filed as a utility patent</p> <p>5 instead?</p> <p>6 A I can't recall any -- exact conversation in that</p> <p>7 way. The words just stood out, utility patent, pretty</p> <p>8 much.</p> <p>9 Q Did you ever seek trademark protection for</p> <p>10 something called a Comfies diaper?</p> <p>11 A No, I did not.</p> <p>12 Q What is the Comfies diaper that is the reference</p> <p>13 on Exhibit 6?</p> <p>14 A I guess it was just a thought, that if I ever</p> <p>15 were to have this manufactured maybe by private label,</p> <p>16 or whatever, that I would want to use that particular</p> <p>17 label for my diaper.</p> <p>18 Q Why did you put the TM after the word Comfies in</p> <p>19 the reference line?</p> <p>20 A I believe -- Now I'm not totally sure on this,</p> <p>21 but I believe Mr. Van Epps might have shared with me</p> <p>22 that, you know, if it's a registered trademark -- you</p> <p>23 have to make a distinction between whether it's</p> <p>24 registered, but to protect like a title or a name you</p>

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<p style="text-align: right;">90</p> <p>1 can put the TM after it.</p> <p>2 Q In the third paragraph down -- I'm going to try</p> <p>3 not to be repetitious from this morning. In the third</p> <p>4 paragraph down, the paragraph that begins "I realize,"</p> <p>5 you state in there that Mr. Van Epps oversimplified your</p> <p>6 design and didn't give any notation to the contents of</p> <p>7 the model, i.e. diaper.</p> <p>8 A Right.</p> <p>9 Q In what way did he oversimplify?</p> <p>10 A By making it a design application. I guess I</p> <p>11 should have been more specific in my letter, but that's</p> <p>12 what I meant.</p> <p>13 Q When you say he didn't give any notation to the</p> <p>14 contents of the model, what do you mean by that?</p> <p>15 A Well, in other words, he didn't describe the</p> <p>16 model at all, or the features. Didn't write any claims.</p> <p>17 Q In the next sentence, which appears to be a</p> <p>18 separate paragraph, you say that Mr. Van Epps should</p> <p>19 have indicated where the extra padding is located.</p> <p>20 A Correct.</p> <p>21 Q To what does the word extra refer?</p> <p>22 A Additional.</p> <p>23 Q Additional beyond what?</p> <p>24 A Well, what I intended at the time was my model</p>	<p style="text-align: right;">92</p> <p>1 I didn't realize we were going to have this</p> <p>2 many people here. Can you share? Okay. Thank you.</p> <p>3 Is it 14?</p> <p>4 (Document marked as requested.)</p> <p>5 MS. ADDISON: Actually, let's go on and mark 15 at</p> <p>6 the same time. 15.</p> <p>7 (Document marked as requested.)</p> <p>8 MR. MANZO: Just so you know, it appears that the</p> <p>9 second page of 15 is included as one of the pages of</p> <p>10 Exhibit 6, page No. 32, except they're different at the</p> <p>11 marginal notation.</p> <p>12 MS. ADDISON: Q Miss Tracy, when you were referring</p> <p>13 to your affidavit in your disclosure document a little</p> <p>14 while ago, are Exhibits 14 and 15 the documents to which</p> <p>15 you were referring?</p> <p>16 A Yes.</p> <p>17 Q Is Exhibit 14 in your handwriting?</p> <p>18 A Yes, it is.</p> <p>19 Q Up in the upper right-hand corner of Exhibit 14</p> <p>20 you indicate that this is invention No. 2.</p> <p>21 A Yes.</p> <p>22 Q And this invention No. 2, to what does it refer?</p> <p>23 A Well, let me read these.</p> <p>24 This refers to my design application that</p>
<p style="text-align: right;">91</p> <p>1 contained extra padding at the waistband. So that's</p> <p>2 what I mean by extra.</p> <p>3 Q Extra implies that there is some padding present</p> <p>4 at the waistband?</p> <p>5 A Well, not being an attorney, or a patent</p> <p>6 attorney, I believe at the time I was just trying to</p> <p>7 imply that there was something additional added to the</p> <p>8 common disposable diaper.</p> <p>9 Q Does extra padding -- by extra padding did you</p> <p>10 mean that there was some padding already present?</p> <p>11 A I don't believe I meant that.</p> <p>12 Q Going down three paragraphs, the one that begins</p> <p>13 with the word "on," there you say that you have marked</p> <p>14 areas where additional padding should be noted.</p> <p>15 A Let me see if I can read the last page. Yes,</p> <p>16 let me see if I can read the last page.</p> <p>17 Q My question for you, Miss Tracy, is, doesn't the</p> <p>18 use of the phrase additional padding imply there's</p> <p>19 already some padding there?</p> <p>20 A I imagine it could imply that. But it also</p> <p>21 could mean that you're adding something that wasn't</p> <p>22 present previously.</p> <p>23 MS. ADDISON: What's our next number, exhibit</p> <p>24 number? 14.</p>	<p style="text-align: right;">93</p> <p>1 Mr. Van Epps had filed.</p> <p>2 Q What was invention No. 1?</p> <p>3 A Well, what I did was I sent these all in at the</p> <p>4 same time. As you can see, they all have the same</p> <p>5 number and the same date. I believe I just wanted to</p> <p>6 cover my basis with my handwriting. And when I typed it</p> <p>7 out, I wanted it to be more legible, and I believe</p> <p>8 they're the same.</p> <p>9 Invention No. 1, I'm not sure. It could be.</p> <p>10 Invention No. 2, that maybe I marked this as just a</p> <p>11 second document and said invention No. 2. I can't</p> <p>12 really recall those fine details of that.</p> <p>13 Q Was it your intention -- is Exhibit 15 merely a</p> <p>14 typewritten version of Exhibit 14?</p> <p>15 A I believe it is.</p> <p>16 Q Okay. Did you type Exhibit 15 yourself?</p> <p>17 A Yes, I did.</p> <p>18 Q And Karen Reynolds, the notary public, was she a</p> <p>19 notary in Mr. Van Epps' office?</p> <p>20 A No, she was a notary at a bank called DuPage</p> <p>21 Bank & trust at that time. It has now been changed to</p> <p>22 FirstStar Bank.</p> <p>23 Q Did she notarize this -- did you have both</p> <p>24 documents notarized at the same time?</p>

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- 1 A Yes, I did.
- 2 Q The handwritten version and a typewritten
- 3 version notarized at the same time?
- 4 A Yes, I did.
- 5 Q You indicate in the second line that your
- 6 improvement that is the subject of this declaration
- 7 involves putting cotton around the waistline and leg of
- 8 the diaper.
- 9 A Yes.
- 10 Q And then in the sketch you have drawn some
- 11 arrows at the waist and the leg cuffs.
- 12 A Yes.
- 13 Q And then underneath, on Exhibit 14, on the
- 14 handwritten version, you say the lining is different by
- 15 the way it goes from inside to out around the legs and
- 16 waist.
- 17 A Yes, that's correct.
- 18 Q Different from what?
- 19 A Well, I meant to imply that it's different from
- 20 the disposable diapers that were out at that time.
- 21 Q The way it was different was the subject of your
- 22 invention, correct?
- 23 A Correct.
- 24 Q And it was different by going from the inside to

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- 1 Q Okay. And does that drawing reflect that the
- 2 lining that you have referred to in Exhibits 14 and 15,
- 3 and which is the subject of your design application,
- 4 actually covers that outside rim of the diaper?
- 5 A Yes. And it's also shown down here as well, in
- 6 figure 3.
- 7 Q I was going to get to that in a minute. What
- 8 does figure 3 show?
- 9 We're on Exhibit 6 now. What does figure 3
- 10 demonstrate?
- 11 A Figure 3 is supposed to demonstrate where I just
- 12 was pointing to earlier, the inside of the diaper in
- 13 this particular figure, and then how it comes around to
- 14 the outside as well, kind of like a 3-D look at it, so
- 15 to speak.
- 16 Q Okay. Figure 3 shows a diaper that is three
- 17 layers, does it not?
- 18 A Three layers? It shows an outer loop. I don't
- 19 know if you'd really call that three layers because
- 20 going from inside to outside, I think, could be one
- 21 layer as it is shown here, looping around. It's
- 22 covering -- if I can just display with the diaper.
- 23 It's going from inside to outside. And so
- 24 they're showing the version where it looks like that

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- 1 the outside as you've indicated here?
- 2 A Correct.
- 3 Q Is that, in fact, what is shown in your design
- 4 application, Exhibit 3, going from -- you've got a
- 5 cleaner copy of it than I do, I think.
- 6 A Let me see here. Yes, it seems as though
- 7 there's a band here going from the inside to the
- 8 outside. They show the inner-most part and then coming
- 9 around and going on the outside in figure 1.
- 10 Q Okay. Miss Tracy, I think you and I understand
- 11 each other, and maybe everybody in the room understands
- 12 what you're saying, but when this lady transcribes it,
- 13 this way and that way is not going to be all that clear.
- 14 A Okay.
- 15 Q Can you show on the camera what you mean from
- 16 inside to outside as you just demonstrated to me in your
- 17 testimony, please.
- 18 A Here is the waistband portion.
- 19 THE VIDEOGRAPHER: Turn it more this way.
- 20 THE WITNESS: Sorry.
- 21 MS. ADDISON: Q Okay.
- 22 A The waistband portion from the inside. And as
- 23 you see the outer scope of the diaper, it also comes to
- 24 the outside.

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- 1 from the side.
- 2 Q But as to the body portion of the diaper, it
- 3 shows a diaper that is three layers, does it not?
- 4 A The body portion, meaning through here?
- 5 Q Yes, figure 3. Is figure 3 not a
- 6 cross-section -- this portion of figure 3 is a
- 7 cross-section of what is being referred to in the '824
- 8 patent as a body portion?
- 9 A If you're looking at this part of figure 3, you
- 10 could see a layer I believe here, inside, and then on
- 11 top. But this loop is also connected to this particular
- 12 loop here. I'm talking about the loop that goes inside
- 13 of this outer loop.
- 14 Q All right. Let's talk about this portion -- Are
- 15 you with us, Mr. Videographer?
- 16 THE VIDEOGRAPHER: Raise it up. You've got glasses
- 17 in the way.
- 18 MS. ADDISON: Q Okay. And diapers, too.
- 19 Okay. And I don't want to put you at a
- 20 disadvantage because it's your testimony that I want.
- 21 A That's okay.
- 22 Q You know what?
- 23 A Excuse me, I just want to look at this a little
- 24 more closely, too.

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<p style="text-align: right;">98</p> <p>1 MS. ADDISON: You're not going to believe it, but I</p> <p>2 just happen to have this with me.</p> <p>3 MR. MANZO: That's for walking around the dangerous</p> <p>4 streets of Chicago.</p> <p>5 THE WITNESS: May I correct myself?</p> <p>6 MS. ADDISON: Q Yes.</p> <p>7 A It does appear that there are three layers in</p> <p>8 this loop here on figure 3. It looks like there's one</p> <p>9 layer on top, one on the bottom, and then the loop that</p> <p>10 goes around.</p> <p>11 Q All right. And when you are referring to the</p> <p>12 loop on figure 3, that portion there, when you say the</p> <p>13 loop --</p> <p>14 A Yes, the one --</p> <p>15 Q That goes all the way around, goes round and</p> <p>16 round?</p> <p>17 A Yes.</p> <p>18 Q Okay. Is this portion, what you're referring to</p> <p>19 as the loop of figure 3, the same portion that you</p> <p>20 outlined in pink this morning for Mr. Baumgartner?</p> <p>21 A That's correct.</p> <p>22 Q This portion of figure 3 is this body part of</p> <p>23 the diaper, right, or --</p> <p>24 A Are you talking about inside of the loop?</p>	<p style="text-align: right;">100</p> <p>1 MR. MANZO: I don't. Where is it?</p> <p>2 MS. ADDISON: Right there. It's in both --</p> <p>3 THE WITNESS: Second paragraph.</p> <p>4 MS. ADDISON: Q It says the lining goes from</p> <p>5 inside to outside and/or front to back. We have just</p> <p>6 discussed what inside to outside means, I believe.</p> <p>7 A Right.</p> <p>8 Q Can you show me please on -- I'm going to hold</p> <p>9 up figure 1 of Exhibit 3, the design application. What</p> <p>10 does front to back mean?</p> <p>11 A Well, as I reread this, I believe what I</p> <p>12 intended to mean was that, you know, there's a backside</p> <p>13 of the diaper and it goes -- you know, there's a back</p> <p>14 portion of the diaper, and then there's the front</p> <p>15 portion of the diaper.</p> <p>16 And going from front to back, this is -- this</p> <p>17 is the front of the diaper. This is the back of the</p> <p>18 diaper. The back also has a front to it. So going from</p> <p>19 this front side to the back outside.</p> <p>20 Q Oh, okay. So front --</p> <p>21 A That's what I believe I mean it to be.</p> <p>22 Q Okay. Front to back then does not mean then the</p> <p>23 circumference of the waistband?</p> <p>24 A Well, I said from inside to out, and then I</p>
<p style="text-align: right;">99</p> <p>1 Q I'm talking about this --</p> <p>2 A Yes, that should be the body part of the diaper.</p> <p>3 Q Okay. And there are three layers right there,</p> <p>4 correct?</p> <p>5 A Yes, uh-huh.</p> <p>6 Q And the three layers, just so we don't have any</p> <p>7 dispute, today, this morning, we were talking about the</p> <p>8 bottom sheet as being the one that touches the parent</p> <p>9 when the diaper's applied and the parent holds the baby?</p> <p>10 A Yes.</p> <p>11 Q The middle layer is the absorbent layer?</p> <p>12 A Yes.</p> <p>13 Q And the top sheet, or top layer, is the one that</p> <p>14 touches the baby when the diaper is applied?</p> <p>15 A Yes, that's correct.</p> <p>16 Q Okay. Miss Tracy, when you said in Exhibits 14</p> <p>17 and 15 -- These are the two affidavits, and I think</p> <p>18 you've said at both places. We've talked about the</p> <p>19 padding going -- or the lining going from inside to</p> <p>20 outside. You say the padding goes from inside to out</p> <p>21 and/or front to back. Do you see the language I'm</p> <p>22 talking about?</p> <p>23 A Yes.</p> <p>24 Q Okay. When you say --</p>	<p style="text-align: right;">101</p> <p>1 specifically said from front to back. So I believe I</p> <p>2 was indicating that it was not only in the front of the</p> <p>3 diaper, but in the back of the diaper as well.</p> <p>4 Q And when you're saying front and back, do you</p> <p>5 mean -- do you mean by that front and back as if a baby</p> <p>6 were wearing it, the front and the back, or do you mean</p> <p>7 front side, backside?</p> <p>8 A Well, at the time -- you know, there's no way it</p> <p>9 can loop completely around because you have two</p> <p>10 openings. So you have the distinction between the front</p> <p>11 portion of the diaper and the back portion of the</p> <p>12 diaper.</p> <p>13 And I believe here I covered it by saying it</p> <p>14 goes from inside to out, but also goes from front to</p> <p>15 back. And I probably should have been more specific and</p> <p>16 said maybe from the front side to the backside, or the</p> <p>17 back-most portion of the diaper, you know, simplifying</p> <p>18 it.</p> <p>19 Q So the way you've used front and back here, it's</p> <p>20 referring from the top sheet to the back sheet?</p> <p>21 A Correct.</p> <p>22 Q From the baby side to the mommy side --</p> <p>23 A Right, exactly.</p> <p>24 Q -- or daddy side?</p>

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<p style="text-align: right;">102</p> <p>1 A Exactly.</p> <p>2 MS. ADDISON: All right. Are we at 16? Okay. This</p> <p>3 will be 16.</p> <p>4 (Document marked as requested.)</p> <p>5 MS. ADDISON: Q Miss Tracy, let me represent to you</p> <p>6 that the number down in the bottom right-hand corner, T</p> <p>7 followed by the 2032, means it was produced by your</p> <p>8 counsel to us in response to document production</p> <p>9 requests.</p> <p>10 A Okay.</p> <p>11 Q What is this document? Or do you recognize this</p> <p>12 document?</p> <p>13 A I vaguely recognize the document, and I cannot</p> <p>14 distinguish completely what Mr. Van Epps might have sent</p> <p>15 in and what he left behind.</p> <p>16 And I can understand why you're questioning it,</p> <p>17 because it's different. But I don't know if he gave</p> <p>18 this portion to me and sent this into the Patent Office.</p> <p>19 But all I know is that both of these were drawn up, and</p> <p>20 what he decided to actually file, I'm not completely</p> <p>21 sure about that, because I never saw the contents of my</p> <p>22 own file.</p> <p>23 Q Okay. The drawing that is between figure 2 and</p> <p>24 figure 3 on Exhibit 16, this drawing right there, what</p>	<p style="text-align: right;">104</p> <p>1 figure 1, is that handwriting yours --</p> <p>2 A Yes, that's mine.</p> <p>3 Q -- where it says extra layers of padding?</p> <p>4 A Yes.</p> <p>5 Q Is the -- the handwriting there says extra</p> <p>6 layers of padding. Is the extra -- are the extra layers</p> <p>7 of padding to which this refers these squiggly lines</p> <p>8 right here?</p> <p>9 A Yes.</p> <p>10 Q Did you color that in?</p> <p>11 A Yes.</p> <p>12 Q What is that document?</p> <p>13 A I am not really sure. It might have been the</p> <p>14 document that Mr. Van Epps and I first talked about when</p> <p>15 he was considering drawing the diaper from the model.</p> <p>16 MR. MANZO: For the record, that appears to be page</p> <p>17 30 of Exhibit 6.</p> <p>18 MS. ADDISON: Q Thank you.</p> <p>19 Do you know -- but you're not certain what it</p> <p>20 is?</p> <p>21 A I'm not certain what it is? I know what it is.</p> <p>22 I know it's a drawing, but Mr. Van Epps and I had</p> <p>23 conversations throughout. And as I said, I'm not so</p> <p>24 sure what he decided to finally send in, but this could</p>
<p style="text-align: right;">103</p> <p>1 does that represent?</p> <p>2 A I believe he's referring to -- it's pointing</p> <p>3 right to this outer loop as if you were to look --</p> <p>4 Q Can you turn --</p> <p>5 A -- inside of it.</p> <p>6 Q -- it to the camera?</p> <p>7 A Yes, sure.</p> <p>8 Q Do you believe that's a cross-section of the</p> <p>9 outer loop?</p> <p>10 A I believe that's what it's intended to be.</p> <p>11 Q When you're using the word outer loop, are you</p> <p>12 again referring to the area that you highlighted in pink</p> <p>13 this morning for Mr. Baumgartner --</p> <p>14 A Yes.</p> <p>15 Q -- on figure 2 of Exhibit 6, the design</p> <p>16 application?</p> <p>17 A Yes, and also in figure 3.</p> <p>18 MS. ADDISON: Okay. 17.</p> <p>19 (Document marked as requested.)</p> <p>20 MS. ADDISON: Q Miss Tracy, I'll represent to you,</p> <p>21 ma'am, that Exhibit 17 also comes from your production</p> <p>22 to us in this case.</p> <p>23 A Okay.</p> <p>24 Q Is the handwriting right below the printed</p>	<p style="text-align: right;">105</p> <p>1 be our discussion as to when he and I were first</p> <p>2 discussing it as to how to represent this diaper.</p> <p>3 Q And, once again, the extra here refers to what?</p> <p>4 A Additional padding.</p> <p>5 Q Additional beyond the padding?</p> <p>6 A I'm not saying beyond. It could be padding</p> <p>7 that's added to an existing disposable diaper that did</p> <p>8 not have padding previously in those particular areas.</p> <p>9 Q And could it be padding that is added to a</p> <p>10 disposable diaper that had padding there?</p> <p>11 A I wouldn't have thought that it needed extra</p> <p>12 padding if it already had padding.</p> <p>13 Q Is there any reason to use the word extra if --</p> <p>14 extra padding if there's no padding already there?</p> <p>15 A I'm not particularly sure.</p> <p>16 Q There wouldn't be any reason to use the word</p> <p>17 padding if there was -- unless there was padding there?</p> <p>18 A Well, you use padding, but you're saying the</p> <p>19 word extra. Extra is something additional.</p> <p>20 Q Additional to what's already there?</p> <p>21 A What's already there could be just a layer of</p> <p>22 material. So it needs something extra, and that being</p> <p>23 padding.</p> <p>24 It could be just -- if this were a diaper, I</p>

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<p style="text-align: right;">106</p> <p>1 could say, you know, this needs something extra, let's 2 put a layer of padding right here. I'd be doing just 3 that. 4 Q There's no reason to say additional layers of 5 padding unless there's some padding already there, is 6 there? 7 A That's not my interpretation. I just showed you 8 what I meant. 9 Q Can you find Exhibit 5 that you were discussing 10 this morning with Mr. Baumgartner? 11 A I have it. 12 Q Could you go to the first page of that exhibit, 13 please. 14 A This is marked 5. 15 Q Let me help you if you don't mind. 16 Here we are. Okay. Paragraph 2 on the first 17 page of Exhibit 5, your Declaration in Support of a 18 Petition to Make Special, you said on or about October 19 11, 1988 it came to your attention that Proctor & Gamble 20 Company of Cincinnati, Ohio was distributing disposable 21 diapers which you believed to be an infringement of the 22 claim and your pending application. 23 A Correct. 24 Q What are the circumstances under which that came</p>	<p style="text-align: right;">108</p> <p>1 MS. ADDISON: Are we on 19 now or 20? I mean the 2 next exhibit. 3 The next one is 18, okay. This will be 18. 4 (Document marked as requested.) 5 MS. ADDISON: Q Did you buy those Proctor & Gamble 6 diapers that you saw in the store or just look at them 7 in the store? 8 A I believe I bought them. 9 Q Exhibit 18 has some handwriting on it. I don't 10 think this was an attachment to anything this morning, 11 and if it was, I apologize. Or if it was, we can give 12 it a proper number. 13 My concern about Exhibit 18 is simply 14 establishing is that handwriting at the top center of 15 the page yours? 16 A Yes, it is. 17 Q It says this area has extra padding/now lining. 18 A Yes. 19 Q What does that mean? 20 A Well, the waistband did not come through very 21 clearly on the copy, but I was merely referring to the 22 waistband having extra padding. 23 Q And when you say now lining, what do you mean by 24 that? Is it that the lining is now providing extra</p>
<p style="text-align: right;">107</p> <p>1 to your attention, Miss Tracy? 2 A I was just going through the Jewel Food Stores, 3 and it was just right after I gave birth to my second 4 child, and I was picking up some diapers. And that's 5 when I came upon the Proctor & Gamble diaper, and I 6 believe they advertised extra padding in the waistband, 7 which brought it to my attention. 8 Q If you will flip, please, to the pages of 9 Exhibit 5 that Mr. Baumgartner has marked pages 18 and 10 19. 11 A Okay. 12 Q There's some handwriting on page 18, and it says 13 waist shield material going from inside to out and/or 14 back to front, and then there's some arrows there. 15 A I was just trying to show as to how it looked on 16 the advertisement. 17 Q Right. But the handwriting and the arrows were 18 written by you, correct? 19 A Yes, they were. 20 Q And, similarly, on page 19 there is printing 21 there, the waistline is designed like mine, inside to 22 out, with some arrows. Is that also your handwriting? 23 A Yes. And, again, I was just referring to the 24 advertisement picture.</p>	<p style="text-align: right;">109</p> <p>1 padding? 2 A Well, it was a very long time ago. I could have 3 meant now lining the inside of the waistband. I'm not 4 really sure, but I wanted to make note there was 5 definitely extra padding there. 6 Q By inside of the waistband you mean the part 7 that's touching the baby, correct? 8 A Yes, or it could have also been contained on the 9 inside of the part that touches the baby as well. 10 Not having that particular diaper before me, 11 it's hard to say, and not having a clear picture, it's 12 very hard to say. 13 Q Okay. Going back to figure 1 of Exhibit 3, the 14 design application, yes, we have this on videotape, but 15 I just want to make sure that there is no confusion or 16 misunderstanding about when you -- in your earlier 17 testimony when you were talking about inside to outside 18 and the arrows. 19 When you were doing the demonstration for us 20 showing your padding going from inside to outside and 21 demonstrating on figure 1 of the design application, by 22 inside you were gesturing to and you meant, did you not, 23 the portion of the diaper that touches the infant when 24 the diaper is worn?</p>

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1 A Yes.
 2 Q Okay. I'd like you, Miss Tracy, please, to find
 3 Exhibit I, which is the '824 patent.
 4 Have I used about 50 minutes?
 5 THE VIDEOGRAPHER: 53.
 6 MS. ADDISON: 53?
 7 THE WITNESS: Okay.
 8 MS. ADDISON: Q Since September of 1986 when you
 9 filed your first declaration, have you met any other
 10 diaper designers or inventors?
 11 A I have not.
 12 Q Have you been to any diaper conventions or --
 13 A Zero.
 14 Q Do diaper designers congregate anywhere?
 15 A I've been invited to go to several types of
 16 different conventions or invention conventions. I've
 17 never gone.
 18 Q Do you have any impression or opinion or view
 19 what is the level of skill of one -- of ordinary skill
 20 in the art of diaper design?
 21 A Well, I don't think you need to have any
 22 engineering degree in order to design something like
 23 this. I don't think it takes a great deal of
 24 engineering.

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1 portion. What is a waistband portion?
 2 A Waistband -- Oh, no, I hope that's not -- Excuse
 3 me.
 4 THE VIDEOGRAPHER: Off the record 2:02.
 5 (Discussion had off the record.)
 6 THE VIDEOGRAPHER: On the record 2:02.
 7 MS. ADDISON: Q Do you need the question read back,
 8 Miss Tracy?
 9 A No. You wanted me to describe what is the
 10 waistband portion?
 11 Q Yes. What is the waistband portion?
 12 A The waistband portion, looking at the diaper, is
 13 the upper-most part, a part of the diaper right here.
 14 If you want to see, there's a distinct strip right here.
 15 I consider that a waistband portion.
 16 Q Okay. Now when you say upper-most, we can say
 17 up because of the angle at which you're holding the
 18 diaper, correct? It's upper-most in this position.
 19 A Yes, correct.
 20 Q Okay. And where does the waistband start and
 21 stop?
 22 A I would say it starts at the very top here, and
 23 I would say it ends right here. You could almost see a
 24 distinct waistband portion. And I'd say anything below

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1 MS. ADDISON: 19.
 2 (Document marked as requested.)
 3 MS. ADDISON: Q What I would like to do with you
 4 now, Miss Tracy, is ask you some questions about some of
 5 the terminology that is used in the '824 patent.
 6 A What page are you on?
 7 Q Right now I'm on the bottom of column 2 at claim
 8 1.
 9 A All right.
 10 Q And if you -- if it would help either one of us
 11 to use a specific diaper as an example, I'm going to ask
 12 you to use Exhibit 19, which is a Drypers diaper.
 13 A Okay. And I do not have --
 14 Q Do you need an extra copy of the '824? Exhibit
 15 I -- I thought we would just use the one that was before
 16 us.
 17 A Wait a minute. I think there's another one
 18 underneath here that has the different claims.
 19 Here we go. It's not the same as that other
 20 copy. All right.
 21 Q All right. Column 2, line 62 --
 22 A Yes.
 23 Q -- says -- This is part of claim 1 of the '824.
 24 It says each end portion having a respective waistband

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1 that you're getting near the abdomen area. And because
 2 why would you distinguish waist from abdomen to begin
 3 with? So that's how I see it.
 4 Q Does where the waistband stops or starts have
 5 anything to do with the inner lining of the diaper?
 6 A Doesn't have anything to do with the inner
 7 lining.
 8 Q Okay. What is it that defines the waistband?
 9 Is it the waist of the infant?
 10 A What goes around the waist, what we know as our
 11 waist, what goes around the waist of the infant,
 12 correct.
 13 Q Okay. How many waistbands does Exhibit 19 have?
 14 A How many?
 15 Q Waistbands.
 16 A -- waistbands? Well, it goes around your entire
 17 waist from front to back. So I would say it has two;
 18 one here and one here.
 19 Q Okay. And when you say one here and one here,
 20 if we lay the diaper -- if we extend the diaper fully,
 21 you were referring to the outer-most portion on the left
 22 side and the most outer -- outer-most portion on the
 23 right side?
 24 A Yes. And I would have to say even further that

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<p style="text-align: right;">114</p> <p>1 once you affix the tab like right here, that is below 2 the waistband portion. 3 Q All right. 4 THE VIDEOGRAPHER: The camera did not see -- 5 THE WITNESS: Pardon? 6 THE VIDEOGRAPHER: The camera did not see the spot 7 you were pointing to. 8 THE WITNESS: I told her once you affix this tab 9 right here, I believe that that is just -- just below 10 the waistband portion of the diaper. 11 MS. ADDISON: Q So that when the -- however many 12 sheets this diaper has, when the sheets are all affixed 13 together, there would be one waistband portion on the 14 right-most side and one waistband portion on the 15 left-most side -- 16 A Uh-huh. 17 Q -- correct? 18 A Right and left, front and back, if you want to 19 put it that way. 20 Q Or as the baby is worn -- as the diaper is worn 21 by the infant, when the sheets are all affixed together, 22 there will be a waistband portion in the front and a 23 waistband portion in the back? 24 A Yes.</p>	<p style="text-align: right;">116</p> <p>1 don't know if it's intentional or not. All I'm trying 2 to figure out is your interpretation of this word. 3 You're grasping more than just -- is the edge 4 more than just what you can run your finger along, what 5 I will now call the top because I'm holding it up? Does 6 the edge extend -- 7 A Is there more than one edge to this diaper? 8 Q No, it's a different question. Does the edge 9 extend down? If I hold this diaper up -- 10 A This is the edge, and I don't see where you can 11 classify this inner part here as an edge. 12 Q All right. The edge is -- as you would hold the 13 diaper in the configuration -- in the position I'm 14 holding it now, the edge is what one would touch if one 15 put one's finger on the top right here of this diaper, 16 correct? 17 A Correct. 18 Q All right. Going to column 3 on the next page 19 of the diaper -- of the diaper -- of the patent, I'm 20 sorry, line 2 of column 3 uses the word adjacent. 21 A Yes. 22 Q And I know that you and Mr. Baumgartner consumed 23 several minutes and probably several pages this morning 24 talking about adjacent, but I don't recall hearing from</p>
<p style="text-align: right;">115</p> <p>1 Q Okay. Is there a difference between waistband 2 and waistline? 3 A Waistband is a fold or a trim piece on a 4 garment. Waistline is your actual waistline on your 5 body. 6 Q Going back to -- I know I'm asking you to jump 7 around a lot. The very next line, after the one we were 8 looking at, we are now down to line 63 in column 2 of 9 the '824. 10 A Yes. 11 Q It uses the word edge. 12 A Uh-huh. 13 Q What is an edge? 14 A Well, this is the edge of the diaper right here. 15 Q Okay. 16 A This is a plastic layer edge on the back of the 17 diaper. 18 Q Is the edge -- as the diaper is worn by the 19 infant, and assuming that the infant does not have any 20 skin protruding over the diaper, is the edge the portion 21 of the diaper that would be sticking straight up? 22 A Yes, this is the edge portion right here. 23 Q Okay. And when you say this, and you're 24 gesturing with your fingers, you were grasping -- And I</p>	<p style="text-align: right;">117</p> <p>1 you your definition of adjacent. And if you gave it, I 2 apologize. I missed it. 3 A I believe I did give it. 4 Q All right. Could you tell me please how you -- 5 how you defined the term adjacent? 6 A I answered that previously this morning. Do 7 I -- I'm just asking my counsel, do I need to answer 8 that again? 9 Q You can reference -- I honestly don't know and 10 don't -- or don't remember if you gave that answer. I'd 11 be glad for you to reference that testimony, but would 12 you be so kind please to tell me your definition. 13 A Sure. I believe I was referring to spacial 14 concepts as you would describe them to a child; above, 15 below, next to, beside. So I believe I said next to. 16 Q Okay. Soft you've already told us you think 17 means comfortable; is that correct? 18 A Yes. 19 Q All right. Going down in column 3, line 6, you 20 use the word presenting. 21 A In column 3, line 6? Yes. 22 Q That the soft substance presenting a soft 23 surface. 24 A Yes.</p>

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<p style="text-align: right;">118</p> <p>1 Q What does the word presenting mean?</p> <p>2 A To bring forth.</p> <p>3 Q When was the last time you looked up that</p> <p>4 definition?</p> <p>5 A I did not look it up recently.</p> <p>6 Q It just popped into your head?</p> <p>7 Is there a difference between presenting a soft</p> <p>8 surface and in contact with a soft surface?</p> <p>9 A Well, if you bring something -- if you bring it</p> <p>10 forth, presenting can also mean, as I'm thinking,</p> <p>11 representing a soft surface. So I think the way it's</p> <p>12 meant here is you are representing a soft surface.</p> <p>13 MS. ADDISON: How much time have I used?</p> <p>14 THE VIDEOGRAPHER: An hour six minutes.</p> <p>15 MS. ADDISON: Let's take five minutes. I need to</p> <p>16 find some documents.</p> <p>17 THE VIDEOGRAPHER: Off the record 2:12.</p> <p>18 (Recess was taken.)</p> <p>19 THE VIDEOGRAPHER: On the record 2:24.</p> <p>20 MS. ADDISON: Q Miss Tracy, if you could have</p> <p>21 before you, please, the '824 patent, which is Exhibit 1,</p> <p>22 the design application, which is Exhibit 3, it's right</p> <p>23 here, and also the Drypers diaper, I think maybe that</p> <p>24 will expedite most of my remaining questions.</p>	<p style="text-align: right;">120</p> <p>1 waistband portion. And it presents a soft surface</p> <p>2 because the padding is inside of the diaper waistband</p> <p>3 portion. It's presenting a soft surface.</p> <p>4 That is different than what reads at the bottom</p> <p>5 saying in contact with the skin of the individual.</p> <p>6 Q And how is it different? Would you please use</p> <p>7 Exhibit 19 to demonstrate.</p> <p>8 A Okay. Well, it says presenting a soft surface</p> <p>9 along at least a portion of said --</p> <p>10 MR. MANZO: I'm going to object to this line of</p> <p>11 testimony. I mean, the claims say what they say, and</p> <p>12 you're asking for a claim interpretation, which the</p> <p>13 inventor's testimony is, in the absence of ambiguity,</p> <p>14 not material.</p> <p>15 So I object on the basis of relevance,</p> <p>16 materiality, and calling for legal conclusions without</p> <p>17 qualifying the witness as a legal expert.</p> <p>18 You're entitled to ask over my objections, but</p> <p>19 I need to register them for --</p> <p>20 MS. ADDISON: You may answer.</p> <p>21 MR. MANZO: -- this deposition.</p> <p>22 MS. ADDISON: Q You may answer.</p> <p>23 A Sure. Let's get to the front of the diaper.</p> <p>24 Okay. This is the front of the diaper. This</p>
<p style="text-align: right;">119</p> <p>1 First of all, let me ask you, with regard to</p> <p>2 the word presenting in claim 1 --</p> <p>3 A Yes.</p> <p>4 Q -- the language of claim 1 says a soft</p> <p>5 substance presenting a soft surface --</p> <p>6 A Correct.</p> <p>7 Q -- along at least a portion of said inside of</p> <p>8 the diaper waistband portion.</p> <p>9 A Yes.</p> <p>10 Q By using the word presenting, does that mean</p> <p>11 something than a soft surface for contact with the skin</p> <p>12 of the individual wearing the diaper?</p> <p>13 A That is in claim 15 at the bottom. Let me read</p> <p>14 claim 1 again, that part of it entirely, please.</p> <p>15 This says inside of the diaper waistband</p> <p>16 portion, claim 1.</p> <p>17 Q Okay. My question is, when claim 1 uses the</p> <p>18 word presenting a soft surface --</p> <p>19 A Correct.</p> <p>20 Q -- along at least a portion of said inside of</p> <p>21 the diaper waistband portion, is that different from a</p> <p>22 soft surface for contact with the skin?</p> <p>23 A Well, how it is different is how I will explain.</p> <p>24 This claim reads that it is inside of the diaper</p>	<p style="text-align: right;">121</p> <p>1 is the waistband portion. The soft surface, the soft</p> <p>2 substance presenting a soft surface along at least a</p> <p>3 portion of said inside of the diaper waistband, so this</p> <p>4 soft padding that is inside of this diaper waistband</p> <p>5 helps present a soft surface.</p> <p>6 Q Is it your opinion, Miss Tracy, that by using</p> <p>7 the word presenting here, the padding member does not</p> <p>8 have to be in direct contact with the skin of the infant</p> <p>9 wearing the diaper?</p> <p>10 A No, the padding member does not have to be in</p> <p>11 direct contact.</p> <p>12 Q Under claim 1 of the '824?</p> <p>13 A It says that it is distinct, which means it is</p> <p>14 separate from all said body portion layer. The soft</p> <p>15 padding member, including material formed from soft</p> <p>16 substance, presenting a soft surface along at least a</p> <p>17 portion of said inside of the diaper waistband portion.</p> <p>18 So when it's inside, it's inside of the waistband</p> <p>19 portion.</p> <p>20 Q Would you please take a look at Exhibit 3, which</p> <p>21 is the application, the design application, and show me</p> <p>22 where in the original design application it is revealed</p> <p>23 that the padding does not have to be in contact with the</p> <p>24 infant wearing the diaper.</p>

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<p style="text-align: right;">122</p> <p>1 A May I ask a question? I'm not sure why we're</p> <p>2 referring to design when we're talking first about this</p> <p>3 particular patent that we're suing under, and we are not</p> <p>4 suing under this patent. So I find it hard to relate to</p> <p>5 the question.</p> <p>6 Q Okay. Well, with all due respect, I don't think</p> <p>7 you need to concern yourself with the reason that I'm</p> <p>8 asking questions.</p> <p>9 A Okay.</p> <p>10 Q Can you tell me whether Exhibit 3, the design</p> <p>11 application, reveals that the soft padding member does</p> <p>12 not need to be in direct contact with the skin of the</p> <p>13 infant wearing the diaper?</p> <p>14 A Well, in this particular design application, it</p> <p>15 shows that it is in contact with the skin of the diaper.</p> <p>16 Q Okay.</p> <p>17 A I mean, with the skin of the individual.</p> <p>18 Q Okay.</p> <p>19 A Excuse me.</p> <p>20 Q And my question, ma'am, is, is there anywhere in</p> <p>21 Exhibit 3, the design application, that it shows that</p> <p>22 the soft padding member does not need to be in contact</p> <p>23 with the skin of the baby wearing the diaper?</p> <p>24 A Okay. There is a padding member as we said.</p>	<p style="text-align: right;">124</p> <p>1 please to column 3 of the '824, line 1.</p> <p>2 A Yes.</p> <p>3 Q It says the soft padding member located along at</p> <p>4 least one of said waistband portions.</p> <p>5 A Yes.</p> <p>6 Q Is that reflected in Exhibit 3, the design</p> <p>7 application?</p> <p>8 A The design application -- I would say yes,</p> <p>9 because the design application does have extra padding.</p> <p>10 In the '824 it says a soft padding member</p> <p>11 located along at least one of said waistband portions.</p> <p>12 So I would have to say, yes, it's present in '824 and</p> <p>13 also in the design application as well.</p> <p>14 Q There is nothing in the design application, is</p> <p>15 there, that would tell one of ordinary skill in the art</p> <p>16 reading the design application that the soft padding</p> <p>17 member is located at least one of the waistband</p> <p>18 portions?</p> <p>19 A It shows that it's located at least one, I</p> <p>20 believe.</p> <p>21 Q The waistband portions of the diaper are in</p> <p>22 figure 2 what you have highlighted in pink, correct?</p> <p>23 A Correct.</p> <p>24 Q Okay. And figure 2 shows -- and to the extent</p>
<p style="text-align: right;">123</p> <p>1 There are three layers here. So in figure 3 there is</p> <p>2 something -- there are two layers inside of this outer</p> <p>3 loop. So that is, I guess you could say, a layered or</p> <p>4 padding member that is not in contact with the baby's</p> <p>5 skin at the waistband.</p> <p>6 Q But when you were talking earlier about the</p> <p>7 padding loop, the padding loop is the loop that loops</p> <p>8 from the inside to the outside and is in contact with</p> <p>9 the baby's skin, correct?</p> <p>10 A Yes.</p> <p>11 Q And that is what is looping around right here,</p> <p>12 correct?</p> <p>13 A Yes.</p> <p>14 Q And nowhere in this diaper is there revealed a</p> <p>15 soft padding member that is not in direct contact with</p> <p>16 the inside of the diaper of the baby's skin when this</p> <p>17 diaper is applied to the baby, correct?</p> <p>18 MR. MANZO: You mean apart from the outside?</p> <p>19 MS. ADDISON: Huh?</p> <p>20 THE WITNESS: You're talking about the contents of</p> <p>21 the inside of the diaper?</p> <p>22 MS. ADDISON: Q Yes.</p> <p>23 A Yes, the contents of the inside of the diaper.</p> <p>24 Q Miss Tracy, if I could call your attention</p>	<p style="text-align: right;">125</p> <p>1 that Exhibit 3 reflects padding at the waist, it shows</p> <p>2 it in both waistband portions, does it not?</p> <p>3 A Correct.</p> <p>4 Q It does not show it in at least one; it shows it</p> <p>5 in both, correct?</p> <p>6 A It shows it in both.</p> <p>7 Q In the design application that is before us as</p> <p>8 Exhibit 3, is there any way that the soft padding member</p> <p>9 that is reflected in the design application would not be</p> <p>10 in contact with the skin of the infant when this diaper</p> <p>11 is worn by the infant?</p> <p>12 A Well, this particular design application shows</p> <p>13 that it is in contact with the skin of the individual.</p> <p>14 Q And under that particular design application</p> <p>15 there is no way that the soft padding member would not</p> <p>16 be in direct contact with the skin of the individual</p> <p>17 when worn, correct?</p> <p>18 A In this particular one, yes.</p> <p>19 Q Okay. On line 2 of column 3 of the '824 patent,</p> <p>20 we talked a few minutes ago about your definition of the</p> <p>21 word adjacent.</p> <p>22 A Yes.</p> <p>23 Q Can you please use Exhibit 19 and explain to me</p> <p>24 what this claim means to you in that it recites a soft</p>

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1 padding member located along at least one side of said
2 waistband portions being adjacent to said plastic layer
3 edge.

4 A Yes.

5 Q What does that mean?

6 A Well, this is next to the plastic layer edge.

7 Q Okay. When you say this --

8 A Do you want me to tear it apart? I'm referring
9 to the inner-most part of the waistband area being
10 adjacent to the plastic layer edge.

11 So I'm talking about -- Let me get this torn
12 apart here. Well, I'm talking about the inner-most
13 portion being adjacent, and also this batting right
14 here, which is also on the inside of the diaper, that's
15 also adjacent to the plastic layer edge. They're both
16 next to the plastic layer edge.

17 Q Okay. So just to make sure I understand your
18 testimony, the soft padding -- in Exhibit 19 is the soft
19 padding member between the top sheet and the back sheet?

20 A There is a soft padding member in between, and
21 then there is a top sheet, though, which also next to
22 the plastic layer edge.

23 Q Okay. And just so I'll have a clear record,
24 that is what is referred to -- you claim that is what is

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1 MS. ADDISON: Q I'm also not trying to get you to
2 be -- I tell you what, let me start over.

3 A Okay.

4 Q You have just told us as regards Exhibit 19, the
5 Drypers diaper, that the soft padding member is adjacent
6 to the plastic layer edge because it is -- the soft
7 padding member is right next to this outside plastic
8 layer edge, correct?

9 A Correct.

10 Q And is that sort of construction revealed in the
11 design application, which is before us as Exhibit 3?

12 A I'll try explaining it another way.

13 Q Thank you.

14 A The extra padding in my design application, the
15 plastic layer edge is covered because it overlaps. Now
16 if you're talking about this part here being at the very
17 top, I guess you could say it's next to it, but it also
18 folds over, which means it covers that plastic layer
19 edge.

20 So I'd have to say it's not just a one-pat
21 answer, because if it's next to it, well, yes, it is,
22 but the elastic is on the inside of -- the plastic layer
23 edge is on the inside of where it folds over. So not
24 only is it adjacent to it, but it continues and it folds

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1 referred to when it says a soft padding member located
2 along at least one of said waistband portions being
3 adjacent to said plastic layer edge?

4 A Yes.

5 Q Is that reflected in the design application that
6 is before us as Exhibit 3?

7 A The design application has extra padding and it
8 folds over the plastic layer edge in the design patent.

9 Q Does the design patent show a soft padding
10 member located along at least one of said waistband
11 portions being adjacent to said plastic layer?

12 A As I said, it overlaps.

13 Q And so in the design application it is adjacent
14 because it comes from the inside of the diaper, inside
15 being when worn, to the outside?

16 A Well --

17 MR. MANZO: Objection, mischaracterizes the
18 testimony.

19 MS. ADDISON: Q I'm really not trying to
20 mischaracterize your testimony. I'm trying to
21 understand your understanding of these claims.

22 A Can I just stick to my previous answer that I
23 already gave you?

24 MR. MANZO: Objection, asked and answered.

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1 over.

2 That's the best way I can explain it to you.
3 So I believe I answered your question by saying yes.

4 Q Okay. In Exhibit 3 it is adjacent --

5 A It's adjacent and.

6 Q -- by folding over -- I'm just trying to
7 understand your testimony.

8 MR. MANZO: No, Counsel. What she said is that it's
9 adjacent because it's next to it and it additionally
10 folds over. That was her testimony. I'm sure that
11 that's what the reporter will reflect.

12 MS. ADDISON: Q Okay. Where in Exhibit 3 -- do you
13 accept your counsel's restatement or characterization of
14 your testimony?

15 A Absolutely.

16 Q Okay. In addition to folding over --

17 A Yes.

18 Q -- where is the soft padded member next to the
19 plastic layer edge?

20 A I already explained that, Counsel, but I'll
21 explain it once again.

22 Q I'm not talking about the folding-over part.
23 I'm talking about the also-being-next-to part of your
24 answer.

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<p style="text-align: right;">130</p> <p>1 A Okay.</p> <p>2 Q I'm really just trying to understand your</p> <p>3 testimony.</p> <p>4 A Okay. It is next to, up here. As I said, the</p> <p>5 plastic layer edge is inside of what is folded over.</p> <p>6 So, yes, it is next to it, but it also folds over.</p> <p>7 So I would have to say yes, it's next to it,</p> <p>8 but it also folds over the top of that plastic layer</p> <p>9 edge.</p> <p>10 Q At what point is it next to it? Is it next to</p> <p>11 it on the inside?</p> <p>12 A Right here at the top. Whatever the waistband</p> <p>13 portion is is where it is next to it. I'm not talking</p> <p>14 about the embodiment. I'm talking about the waistband</p> <p>15 portion, which we can clearly see in the design</p> <p>16 application.</p> <p>17 Q Okay. Where is the plastic layer edge in figure</p> <p>18 1?</p> <p>19 A In figure 1? I believe it is right beneath the</p> <p>20 loop.</p> <p>21 MS. ADDISON: All right. Let's hold this up.</p> <p>22 THE VIDEOGRAPHER: Move the bottle, please.</p> <p>23 THE WITNESS: Or inside of the loop.</p> <p>24 MS. ADDISON: Q Okay. The plastic layer edge is</p>	<p style="text-align: right;">132</p> <p>1 me?</p> <p>2 A Yes, I sure will. Let me get my glasses on so I</p> <p>3 can see these layers more distinctly. I'm going to use</p> <p>4 this to point rather than my finger.</p> <p>5 Q Would you like to use this?</p> <p>6 A No, that's okay. That's kind of large for me to</p> <p>7 hold that up and this at the same time.</p> <p>8 Here is --</p> <p>9 MS. ADDISON: Are you getting this,</p> <p>10 Mr. Videographer?</p> <p>11 THE VIDEOGRAPHER: Yes.</p> <p>12 THE WITNESS: It's very hard to pick up this loop,</p> <p>13 but there is a portion here where it stops, of these</p> <p>14 inner layers right here. And then the loop goes around</p> <p>15 it.</p> <p>16 So I would say that it is adjacent, you know,</p> <p>17 up to this point, but then it also continues and</p> <p>18 overlaps and folds over. You have to say it is -- it's</p> <p>19 right next to it, inside this drawing.</p> <p>20 MS. ADDISON: Q Okay. But it is adjacent then --</p> <p>21 leaving aside the part that folds over, it's adjacent to</p> <p>22 the plastic layer edge on the outside of the diaper</p> <p>23 where it touches the plastic layer sheet?</p> <p>24 A It's adjacent on the inside and the outside</p>
<p style="text-align: right;">131</p> <p>1 the center cross-hatching of this what you're referring</p> <p>2 to loop as shown in figure 3 of Exhibit 3, correct?</p> <p>3 A It's like those two layers that are inside of</p> <p>4 this loop. One of those is the plastic layer edge.</p> <p>5 Q Okay.</p> <p>6 MR. MANZO: Could I just offer a suggestion?</p> <p>7 MS. ADDISON: Yes.</p> <p>8 MR. MANZO: If you agree that any part of the</p> <p>9 drawings from the utility patent correspond to those.</p> <p>10 the ones of the utility patent have numbers and you</p> <p>11 could use numbers to facilitate your interrogation.</p> <p>12 It's up to you.</p> <p>13 MS. ADDISON: Q Thanks. I want to stick with this</p> <p>14 one.</p> <p>15 If you use figure 3, the soft padding member</p> <p>16 going from the inside to outside of the diaper is</p> <p>17 reflected in cross-section right there as we've</p> <p>18 previously discussed, correct?</p> <p>19 A Yes. Yes, I'm sorry.</p> <p>20 Q Okay. In addition to the going from the inside</p> <p>21 to the outside that we have already discussed --</p> <p>22 A Right.</p> <p>23 Q -- where is the soft padding member adjacent to</p> <p>24 the plastic layer edge? Can you use figure 3 and show</p>	<p style="text-align: right;">133</p> <p>1 because it folds over.</p> <p>2 Q On figure 3 -- It seems to be easier for you to</p> <p>3 hold it upsidedown, and I just want to make this easier</p> <p>4 for you. On figure 3 of Exhibit 3, which is the inside</p> <p>5 and which is the outside of the diaper?</p> <p>6 A I would say, and I haven't looked at this in a</p> <p>7 while, but I would say that this is the inside portion</p> <p>8 of the diaper right here, and then this is probably the</p> <p>9 outside of the diaper.</p> <p>10 Q Okay. And would you just point to the part at</p> <p>11 which the plastic layer edge is adjacent to the soft</p> <p>12 padded member? Just point.</p> <p>13 A Yes. And I said it in reverse the last time.</p> <p>14 But going from inside to outside, it is adjacent to it</p> <p>15 right at the very top point as to where these inside</p> <p>16 layers are, where it stops. Then it continues to</p> <p>17 overlap and fold over. So it's adjacent and it also</p> <p>18 folds over the top of the plastic layer edge.</p> <p>19 Q Okay. And in Exhibit 19 where, in your opinion,</p> <p>20 is it adjacent?</p> <p>21 A I think I pointed that out previously. I'll do</p> <p>22 it again.</p> <p>23 Q I think this was 19.</p> <p>24 A That's 19?</p>

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1 Q Yes, that's 19.
 2 A Excuse me.
 3 Q Okay.
 4 A In this particular, it is adjacent to the
 5 plastic layer edge right up here. This is your plastic
 6 layer edge, and it is -- if you open it up, it's right
 7 next to it.
 8 Q Miss Tracy, I am advised that there may have
 9 been some developments in the pending application since
 10 you have produced documents to us. Do you know what I'm
 11 referring to?
 12 A Yes.
 13 Q Can you tell me what that is, please?
 14 MR. MANZO: At this point we must designate the
 15 transcript as confidential. Actually, we also have to
 16 designate as confidential the part where Mr. Baumgartner
 17 announced the serial number of the pending application.
 18 MS. ADDISON: Okay.
 19 THE WITNESS: Should I go into -- Okay.
 20 MR. MANZO: Go ahead.
 21 (Whereupon, the following portion of the
 22 deposition has been designated confidential.)
 23 THE WITNESS: Yes, in that the pending application
 24 we're asking them to accept my declaration.

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1 THE VIDEOGRAPHER: On the record 2:51.
 2 MS. ADDISON: With everyone's understanding that
 3 this deposition has been under time constraints and on
 4 limited scope, I understand that even with the time
 5 constraints and limited scope, I may have as much as a
 6 whopping eight minutes left.
 7 I am confident after I pass the witness I may
 8 think of eight more minutes of things to ask you, but at
 9 the time being I think this might be a logical time for
 10 me to conclude my questioning of you for purposes of
 11 today.
 12 I certainly have other things that we will ask
 13 you at the conclusion of your deposition at a later
 14 time.
 15 THE WITNESS: Okay.
 16 THE VIDEOGRAPHER: End of tape 2. Off the record
 17 2:52.
 18 (Recess was taken.)
 19 THE VIDEOGRAPHER: This is tape 3, continuing
 20 deposition of Rhonda Tracy. Time is 2:59 on May 25,
 21 2000. On the record.
 22 EXAMINATION
 23 by Mr. Smith:
 24 MR. SMITH: Q Good afternoon, Miss Tracy.

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1 MR. MANZO: Let me restate this so you have it
 2 accurately if you don't mind.
 3 MS. ADDISON: Thank you. I appreciate that.
 4 MR. MANZO: The examiner did not enter the
 5 declaration, and so a continuing -- a continuation -- a
 6 CPA application was filed requiring the examiner to
 7 enter the amendment in it and consider the declaration.
 8 And the last serial number will be abandoned on entry of
 9 the CPA application.
 10 MS. ADDISON: Okay.
 11 MR. MANZO: And we will file more claims and cite
 12 all the prior art, et cetera, and tender any transcripts
 13 you want us to tender.
 14 (Whereupon, this concludes the confidential
 15 portion of the deposition.)
 16 MS. ADDISON: Mr. Videographer, how much time have I
 17 used?
 18 THE VIDEOGRAPHER: One-hour-thirty-one.
 19 MS. ADDISON: Okay. I'd like to go off the record
 20 for about one or two minutes just to look through my
 21 documents to see if I'm at a logical conclusion point,
 22 or if there's anything else I need to ask you about.
 23 THE VIDEOGRAPHER: Off the record 2:49.
 24 (Recess was taken.)

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1 A Hi.
 2 Q My name is Craig Smith from Fish & Richardson,
 3 and we represent Confab Holding Corporation in this
 4 lawsuit.
 5 If there are any questions that I ask you that
 6 you don't understand, please let me know and I'll try to
 7 clarify them for you.
 8 A Okay.
 9 Q I'd like to cover some of the ground that has
 10 already been covered today, and I apologize if there's
 11 some overlap, but please just bear with me.
 12 A Okay.
 13 Q Can we start with, when did you conceive of the
 14 invention that's disclosed in the '824 patent?
 15 A Well, actually I'm going to have to say it goes
 16 all the way back to 1986, my original disclosure,
 17 because that is extra padding. However you look at it,
 18 it's extra padding, so plain and simple. So I'm going
 19 to have to say 1986.
 20 Q Okay. What date would you place on that?
 21 A Well, I know my disclosure is stamped September
 22 2, 1986, but I have to say I gave it a lot of thought
 23 even prior to that.
 24 I believe I may have come up with it sometime

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<p style="text-align: right;">138</p> <p>1 before that and just didn't actually go through the 2 steps of doing something about it until that time of 3 September 2, 1986. 4 Q Okay. Can you put a date on when you started 5 thinking about it? 6 A I would have to say it might have been, oh, to 7 the best of my recollection, somewhere even in '85 when 8 I might have started thinking about it. 9 Q Late '85? 10 A Somewhere in '85, I believe. I can't say 11 specifically. It's an approximation. 12 Q And how did you come up with this invention? 13 A Because my son was the one that was suffering 14 from the diapers that were being made. And I would see 15 lines and red marks and little abrasions on his skin. 16 And I thought, you know, there's got to be a better way 17 than that, and so I decided just to do something about 18 it because there wasn't any diaper out there that had 19 this additional padding. 20 Q And what were the lines, abrasions and scratches 21 I think you said a result of? 22 A The elastic waistband particularly. I would say 23 more so there than in the legs. 24 Q And can you be a little more specific about what</p>	<p style="text-align: right;">140</p> <p>1 extra comfort that was needed in the disposable diaper. 2 Q And this padding was covering these -- this 3 elasticized waist? 4 A Well, it was to be within the waistband, and the 5 purpose of it was to provide extra cushioning or 6 padding. 7 On how the manufacturer worked that in was not 8 really up to me, but it was supposed to be an extra 9 strip that was distinct and separate from the rest of 10 the diaper. 11 Q Your initial attempt to solve this perceived 12 problem, though, was to put a piece of padding over the 13 waistband? 14 A Correct, either inside or over. You know, it 15 didn't matter. I know my original design went from 16 inside to outside, but it was extra padding. And since 17 then, you know, it's covering both aspects, being inside 18 and also in contact with the wearer's skin. 19 Q Did you ever develop a prototype that had the 20 padding inside of the waistband? When I'm using inside, 21 I'm actually talking in between the top layer and back 22 layer. 23 A The only thing I did, if you say prototype, take 24 a diaper and just affix it inside of the waistband, yes,</p>
<p style="text-align: right;">139</p> <p>1 about the waistband? 2 A Well, I think I mentioned this earlier, I'm 3 happy to explain again, that I believe the elasticized 4 waist had such threading in it that made it pretty stiff 5 at the time. It just wasn't as flexible and provided a 6 soft enough surface at the waistband in contact with the 7 skin. 8 Otherwise, he wouldn't have had the red marks 9 that he had. He wasn't overweight or anything like 10 that. He was normal weight. So that's what really made 11 me think of it. 12 Q How did your invention solve this perceived 13 problem? 14 A Well, it seems like diaper companies are using 15 it, so they have to think it's valid. There's some good 16 reason for the application, because it's still being 17 used. So if it wasn't useful, they wouldn't be making 18 it. 19 Q Right. Can you describe specifically though how 20 your invention cured this problem of the abrasions and 21 scratches that you were noticing? 22 A Well, it provided, like I said, an extra layer 23 or a cushioning or padding that was not in the diapers 24 previously and, therefore, it seemed to give it that</p>	<p style="text-align: right;">141</p> <p>1 I did that. But did I present it to anyone as a model? 2 No, just in discussion. 3 Q Now when you say inside, how are you using 4 inside? 5 A Inside meaning inside the original batting or 6 the top layer batting. And also in between let's just 7 say the outer covering and the original bat. 8 Q So was the padding touching the skin of the 9 intended user? 10 A Are you talking about the modification that was 11 made? 12 Q Correct, the padding. 13 A On the inside, no, it's not touching. 14 Q On the inside of -- 15 A On the inside -- on the inside portion of the 16 diaper at the waistband it is not directly touching the 17 skin of the wearer. 18 Q Okay. Can I direct your attention to Exhibit 6, 19 page 32. 20 A Okay. 21 Q Do you recognize this document? 22 A Yes, I do. 23 Q And is that your signature on the bottom? 24 A Yes.</p>

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<p style="text-align: right;">142</p> <p>1 Q Does this document describe your invention?</p> <p>2 A Yes, it does, back then.</p> <p>3 Q What do you mean by back then?</p> <p>4 A Well, it's obviously dated the 2nd day of</p> <p>5 September, 1986. And so, yes, it goes back.</p> <p>6 Q Previously you had testified that the term</p> <p>7 inside as used in this document referred to the portion</p> <p>8 of the diaper that would be facing the baby's skin; is</p> <p>9 that accurate?</p> <p>10 A That's correct.</p> <p>11 Q And the term outside would then refer to the</p> <p>12 portion of the diaper that would be facing away from the</p> <p>13 baby's skin?</p> <p>14 A Yes, the outside of where the outer covering is.</p> <p>15 Q The outer cover. So if I use back sheet --</p> <p>16 A Yes, correct.</p> <p>17 Q -- that would mean the same thing to you?</p> <p>18 A Describe it, yes.</p> <p>19 Q Does this document at all describe placing the</p> <p>20 padding between the top sheet and the back sheet?</p> <p>21 A No, this one does not.</p> <p>22 Q Can you turn to page 33 of Exhibit 6.</p> <p>23 A Yes.</p> <p>24 Q And do you recognize this document?</p>	<p style="text-align: right;">144</p> <p>1 Q I'd like to direct your attention to page 34 and</p> <p>2 paragraph 12.</p> <p>3 A Okay.</p> <p>4 Q Can you read for me the typed portion starting</p> <p>5 with cotton or gauze.</p> <p>6 A Yes. Want me to read that for you?</p> <p>7 Q Yes, please.</p> <p>8 A Cotton or gauze-type lining/padding around the</p> <p>9 waistband and leg area of diaper. Old method is just</p> <p>10 plastic and provides no cushioning. Lining/padding is</p> <p>11 contained on the inside, but can go to the outside as</p> <p>12 well. Therefore, will protect skin when it overlaps.</p> <p>13 Q And the term inside as used here is the same as</p> <p>14 you've used it in the document at page 32, meaning the</p> <p>15 topside layer, the layer that would be facing or</p> <p>16 touching the baby's skin?</p> <p>17 A Correct.</p> <p>18 Q And outside refers to the back sheet layer?</p> <p>19 A Correct.</p> <p>20 Q Does anything in this document describe placing</p> <p>21 the padding in between the back sheet and the top sheet?</p> <p>22 A No, this one does not.</p> <p>23 Q Can I direct your attention to paragraph 13,</p> <p>24 which is located on page 34 of Exhibit 6.</p>
<p style="text-align: right;">143</p> <p>1 A Oh, yes, I believe.</p> <p>2 Q Is that your signature on page 35?</p> <p>3 A Yes.</p> <p>4 Q What is this document?</p> <p>5 A Let me refresh. It's been so long.</p> <p>6 I believe this is a document that Robert Van</p> <p>7 Epps had questioned me about, and then he -- he I</p> <p>8 believe had it typed. I'm not sure about who actually</p> <p>9 did the typing of this, but I know it was -- I believe</p> <p>10 this was a document that he had had and questioned me</p> <p>11 about.</p> <p>12 Q Did Mr. Van Kamp prepare this document for you?</p> <p>13 A I believe it was a standard document that he had</p> <p>14 within his office.</p> <p>15 Q And, excuse me, I just realized that it was Van</p> <p>16 Epps.</p> <p>17 A Yes, Van Epps.</p> <p>18 Q And Mr. Van Epps prepared this document for you?</p> <p>19 A I believe, yes, the questions, yes.</p> <p>20 Q And you provided the answers that are shown</p> <p>21 typed into the various --</p> <p>22 A Yes.</p> <p>23 Q -- spaces?</p> <p>24 A Correct.</p>	<p style="text-align: right;">145</p> <p>1 A Yes.</p> <p>2 Q Do you see where paragraph 13 says alternatives</p> <p>3 to or variations of the method or apparatus?</p> <p>4 A Yes.</p> <p>5 Q What was the response that you gave to that?</p> <p>6 A I said none, except that the different types of</p> <p>7 cotton may be used to accomplish this result.</p> <p>8 Q So at time that this document was created you</p> <p>9 didn't know of any other methods or variations on what</p> <p>10 you've disclosed in this document?</p> <p>11 A Correct, at that time.</p> <p>12 Q At what point in time did you -- Strike that.</p> <p>13 So up until this point in time there's no disclosure</p> <p>14 about placing the padding in between the top sheet and</p> <p>15 the back sheet; is that accurate?</p> <p>16 A Right. I wasn't that distinct of placing it in</p> <p>17 between those areas, placing it between the top sheet</p> <p>18 and back sheet, that's correct.</p> <p>19 Q At what point in time did you actually disclose</p> <p>20 the invention of putting the padding in between the top</p> <p>21 sheet and the back sheet?</p> <p>22 A I would have to say it was between I would</p> <p>23 say -- oh, I'm trying to think. It would have to be</p> <p>24 between the time I think this was first originated and</p>

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<p style="text-align: right;">146</p> <p>1 the time that my first utility patent was then applied 2 for back in 1990, I believe. I'm not really clear on 3 the exact dates. So in between that time. 4 Q So we're talking about the period between 5 February 1987 and when your first utility application 6 was applied for? 7 A 1987 -- 8 Q I'm getting the February 1987 date from the 9 invention disclosure document that is labeled page 33 of 10 Exhibit 6. 11 A I would have to say that's -- it's hard to say 12 an exact date as to when that came about, but I was 13 continually looking at diapers from day one on the 14 marketplace and constantly being aware of modifications 15 or uses that might be applicable. So I can't say an 16 exact date, but it was in between those times that I 17 mentioned to you earlier. 18 Q And the times that we mentioned earlier, would 19 it be accurate to represent those times as from February 20 1987 until the date that you filed your first utility 21 application? 22 A I would even say perhaps '86 because Mr. Van 23 Epps actually had some documents for me, I believe, 24 going back to March of '87, and he took a long time to</p>	<p style="text-align: right;">148</p> <p>1 little clearer. Are there any documents that you are 2 aware of that describe your invention of placing the 3 padding between the top sheet and the back sheet? 4 A I believe when Mr. Manzo first took over my case 5 or if you want to say my applications, I believe it's 6 probably somewhere within those documents. 7 Q What time frame was that? 8 A I believe I came in contact with Mr. Manzo 9 around 1990. I actually came in contact with him prior 10 before that, excuse me, but where we really started 11 talking about entertaining him representing me. 12 Q What type of documents would those be? 13 A Well, I presented, I believe, papers and diapers 14 at that time. 15 Q What type of papers? 16 A Everything that I had. These documents here, 17 these exhibits if you will before you, such as 18 Defendant's Exhibit 6, I turned over those documents 19 once we agreed to work together. 20 Q And what diapers were you referring to? 21 A I'm referring to the discussion of the -- if you 22 want to call it a sandwich construction where it's in 23 between the top sheet and the back sheet. That was 24 definitely discussed between Mr. Manzo and myself.</p>
<p style="text-align: right;">147</p> <p>1 file, about six months later. 2 And I had paid him for a search. And the next 3 step was to file the application. And it was very 4 surprising that he had taken that long to actually file 5 the application in 1987. 6 So all I can say is I believe it was somewhere 7 in between that time. And he and I had various 8 discussions of modifications, and then, of course, 9 resulting in this ornamental type of design, which was 10 what he was willing to do at that time. 11 Q Do you know of any documents that exist that 12 describe your invention of adding padding between the 13 back sheet and the top sheet? 14 A There are no documents I believe that describe 15 that. They were in verbal discussions. 16 Q Verbal discussions with whom? 17 A With my attorney, Van Epps, then Mr. Gilhooley 18 (phon.), then Mr. Manzo. 19 Q Are there any documents that exist today that 20 describe the invention of placing the padding between 21 the top sheet and the back sheet? 22 A On my behalf where I have -- I'm sorry, could 23 you ask that again? 24 Q Sure. I'm sorry. Let's see if I can make it a</p>	<p style="text-align: right;">149</p> <p>1 Q I'd just like to ask you a few questions about 2 the design application. 3 A Sure. 4 Q If you could turn your attention to Exhibit 3. 5 A Okay. 6 Q Please direct your attention to page 5 of 7 Exhibit 3. 8 A Correct. 9 Q Is there any figure on page 5 that shows the 10 cross-section of the waistband? 11 A The only place where it shows any cross-section 12 is down here in figure 3. It shows any -- I'm sorry. 13 Q I'm sorry. 14 A That's the only cross-section I believe that is 15 shown. 16 Q And figure 3 shows the cross-section at the 17 leg-gathering portion; is that accurate? 18 A Yes, it is. I'm just now noticing, yes, the 19 arrows are right here pointing to the leg area, correct. 20 Q So there is no figure similar to figure 3 that 21 would describe or show the cross-section of the waist 22 portion? 23 A Apparently not, because figure 3 is pointing to 24 this area here, which is obviously pointing to the leg</p>

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1 area.

2 Q So there's no way of telling from the figures on
3 page 5 what the cross-section of that waist is?

4 A Again, something Mr. Van Epps left out, but I
5 would have preferred he included in the waistband, but
6 it shows here in the leg area, correct.

7 Q And you had stated previously that, just from
8 looking at these figures, there's no way to tell that
9 the portions on the extremes of the waist -- Strike
10 that.

11 From these figures is there any way to tell
12 that the members that you have highlighted in pink are
13 soft?

14 A Well, I believe I discussed that with
15 Mr. Baumgartner previously. And my contention is it's
16 implied that whatever you add for a baby would be soft.
17 That was my intention. That was my implication at the
18 time, my honest intention.

19 Q But the figure doesn't show that?

20 A Right. I mean, the figure shows that there's an
21 extra layer at the legs and the waist. And I would hope
22 that one would imply that those are soft and it's not
23 hard. Because -- I'm sorry.

24 Q Go ahead.

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1 has it here obviously in the waistband in figure 1, and
2 figure 1 is really no different than figure 2, which is
3 including the legs.

4 They both, you know, overlap from inside to
5 outside. So I would have to say figure 3 is a
6 representation of figure 1 at the waistband. He's just
7 got arrows distinguishing that.

8 Q But there's no figure that shows that?

9 A Right.

10 Q Is there any figure in this design application
11 marked Defendant's Exhibit 3 that shows padding between
12 the top sheet and the back sheet?

13 A No, I don't believe. Padding between the top
14 sheet and the back sheet? Excuse me, let me rethink
15 that for a moment.

16 There is padding between the top -- if I may
17 rephrase, there is padding between the top sheet here,
18 which I think is the inside of the waist portion. And
19 the back sheet here, this cross-section has some padding
20 in it.

21 And I believe we discussed that earlier,
22 because she asked me if there were three layers and like
23 a layer in between be padding.

24 Q What I was referring to is the padding at the

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1 A I just want to add that he does use at least the
2 word a new ornamental design for a disposable diaper,
3 which at least saves me, I think, to the portion where
4 disposable diapers at that time were no longer girded by
5 rubber pants, you know, which are hard. So they tried
6 to improve that, but -- make it soft, but yet also
7 disposable. That's the only thing I have to go on, is
8 an implied intention.

9 Q And from figure 3 you can't even tell if there's
10 extra material on the waist portions because there's no
11 cross-section for those waist portions?

12 A There is no --

13 MR. MANZO: Objection, argumentative.

14 MR. SMITH: Q Could you repeat your answer? I'm
15 sorry.

16 A I would say it appears to be showing primarily
17 in the leg areas. But may I add something to that,
18 Counsel?

19 My intention of extra padding here was in the
20 waist and legs. So what he is showing here in figure 3
21 where it's pointing at this leg area here, it's no
22 different than what's in the waistband.

23 So if you want to say is this a cross-section
24 of the waistband, I would have to say, yes, because he

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1 waistline.

2 A Well, what's interesting is the more layers you
3 have, the more padding you have. So you do have what's
4 inside of this loop area. That is padding.

5 I mean, how could you -- it may be the inside
6 portions, but I would have to say that is padding. And
7 the extra layer that I put in on the outside -- I'd say
8 when you combine those together, the three of those
9 together, it makes it have a little more padding by
10 combining them together.

11 Q My question was more directed towards the
12 padding --

13 A In the waistband itself?

14 Q -- between the top layer and the back layer in
15 the waistband portion of the diaper.

16 A What it shows here is a loop, and that loop is
17 padding. And the loop goes from the inside to the
18 outside of the diaper. And that's the best that I can
19 tell you.

20 Is it inside of the waistband is what you're
21 trying to ask me, Counsel?

22 Q My question was, does this design application
23 show a figure where the padding is between the top sheet
24 and the back sheet in the waist portion?

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<p style="text-align: right;">154</p> <p>1 MR. MANZO: Asked and answered.</p> <p>2 MR. SMITH: Q You can answer that.</p> <p>3 A Okay. That's a tough one, but I would say no.</p> <p>4 Q Okay. I'd like to now go to Exhibit 5. This,</p> <p>5 as you may recall, is your Declaration in Support of a</p> <p>6 Petition to Make Special.</p> <p>7 A Yes.</p> <p>8 Q Do you remember this document?</p> <p>9 A Yes, I do.</p> <p>10 Q Okay.</p> <p>11 A Let me get to that. Here we go. Okay.</p> <p>12 Q And I'd like to direct your attention to page</p> <p>13 18. I know you've been shown this before.</p> <p>14 A Yes.</p> <p>15 Q And the handwriting that is on page 18 you said</p> <p>16 is your own; is that correct?</p> <p>17 A Yes.</p> <p>18 Q And I just want to clarify. The writing that</p> <p>19 says from inside to outside, there you're referring</p> <p>20 again from the inside the top sheet to the back sheet of</p> <p>21 the waist?</p> <p>22 A Correct. And I'm referring to just this</p> <p>23 advertisement as you see it visually. Not to say that</p> <p>24 this advertisement represents what this moisture-proof</p>	<p style="text-align: right;">156</p> <p>1 top layer and the back layer, and we're talking about</p> <p>2 actually going -- it would be the portion of the padding</p> <p>3 that would touch the baby's skin would go over and go to</p> <p>4 the back -- the back sheet of the diaper.</p> <p>5 A That's the way the advertisement appeared on all</p> <p>6 outside appearances at the time, just looking at the</p> <p>7 advertisement.</p> <p>8 Q And that's what you meant when you wrote that?</p> <p>9 A Right, just how it looked.</p> <p>10 Q And if you could turn to page 19, again, this</p> <p>11 has handwriting on it that you said is your own; is that</p> <p>12 correct?</p> <p>13 A Correct.</p> <p>14 Q And here, again, it's written the waistline is</p> <p>15 designed like mine (inside to out). And there you're</p> <p>16 referring again that the padding is touching the baby on</p> <p>17 one side and coming over the top layer and back layer</p> <p>18 and then landing on the back layer?</p> <p>19 A Correct. That's what got my attention when I</p> <p>20 first glanced at it, was how it looked, and it looked</p> <p>21 like it was mimicking my design.</p> <p>22 Q Okay. I'd now like to go to Exhibit I, which is</p> <p>23 the '824 patent.</p> <p>24 A Yes.</p>
<p style="text-align: right;">155</p> <p>1 waistshield is contending once you get inside the</p> <p>2 waistband.</p> <p>3 It appears to be that way from the</p> <p>4 advertisement, but I'm not saying that this</p> <p>5 advertisement represents what is actually inside the</p> <p>6 waistband that they're advertising. I'm not saying</p> <p>7 that. It was -- I'm sorry.</p> <p>8 Q If you had something more, please.</p> <p>9 A No, that's okay.</p> <p>10 Q But your statement here and the arrows that</p> <p>11 you're drawing are showing that the -- there is padding</p> <p>12 that overlaps --</p> <p>13 A I'm saying this represents just from -- just</p> <p>14 from the picture -- Again, I want to clarify. I'm not</p> <p>15 saying that this picture represents what's actually in</p> <p>16 the waistband once you open it up.</p> <p>17 It just appeared at first glance from the</p> <p>18 outside and not tearing into the diaper, spotting this</p> <p>19 at the grocery store, that it was going from the inside</p> <p>20 to the outside as my design did. That's all I'm saying.</p> <p>21 Q Okay. I apologize for any confusion.</p> <p>22 A That's okay.</p> <p>23 Q I just wanted to make sure I understood that</p> <p>24 inside to outside wasn't talking about in between the</p>	<p style="text-align: right;">157</p> <p>1 Q I would like to direct your attention to claim</p> <p>2 1, which starts at the bottom of column 2.</p> <p>3 A Okay.</p> <p>4 Q The first paragraph of claim 1 start "a body</p> <p>5 portion." Do you see that paragraph?</p> <p>6 A Yes.</p> <p>7 Q And do you see the portion of that paragraph</p> <p>8 that refers to the body portion being shaped so that</p> <p>9 said diaper may extend about a waist and crotch of a</p> <p>10 wearer and have an inside and an outside with respect to</p> <p>11 the wearer?</p> <p>12 A Yes.</p> <p>13 Q Now, there the inside and outside again refers</p> <p>14 to an inside that would be touching the skin of the</p> <p>15 baby, or the wearer, and the outside, which would be on</p> <p>16 the outer or back layer of the diaper?</p> <p>17 A Correct.</p> <p>18 Q Moving to paragraph 3, which start "at least two</p> <p>19 body portion layers," do you see that?</p> <p>20 A Yes.</p> <p>21 Q It refers to a plastic layer having an edge at</p> <p>22 the edge of the diaper.</p> <p>23 A Correct.</p> <p>24 Q Do you see that?</p>

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1 A Yes.

2 Q Could you show me in the figures that are on the

3 second page of the patent where the plastic layer is?

4 And if you want to give me a number that refers to the

5 plastic layer, that would be okay.

6 A I would have to say that is -- Excuse me.

7 Figure 2 on the left appears to be No. 24 on the left,

8 but on the right No. 24 also goes inside the waistband.

9 That is the edge, figure 2, No. 24 on the left.

10 MR. MANZO: Could I hear that answer again, please.

11 (Record read.)

12 MR. SMITH: Q So are you saying that No. 24 is the

13 plastic layer?

14 A When you told me to specifically look at the

15 figure and -- Didn't you ask me the edge?

16 Q I just said the plastic layer.

17 A Oh, the plastic layer. I thought you were

18 referring to the edge. I'm sorry, Counsel.

19 Q That's okay.

20 A You're talking about the outer plastic layer

21 then?

22 Q I'm just looking for where in the figures it

23 refers to the plastic layer having an edge at the edge

24 of the diaper --

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1 that would be helpful -- May I do that?

2 Q The pointing didn't seem to work very well, so

3 why don't we -- Well, look into the specification.

4 Maybe you could show me where in the written description

5 of the patent it refers to this plastic layer having an

6 edge at the edge of the diaper.

7 A In figure 4 specifically you're speaking of?

8 Q If you can find it in reference to other

9 figures, that's fine, too.

10 A I would have to say 42 of a plastic material and

11 the like located on each of the enlarged sections --

12 Wait a minute. That's in figure 2, excuse me.

13 Q 42 is also in figure 4.

14 A Where in figure 2 do you see it? I see it here

15 in 4, but you're saying it's in figure 2 as well?

16 Q Oh, no. I was saying it's in figure 4.

17 A I thought you were saying it's in figure 2 as

18 well.

19 Q So you're referring to item 42?

20 A I would have to say, according to how this looks

21 to me, from what I can see, this is the edge right here,

22 and it is referring to -- as it reads here, 42, I'm

23 looking at line 34, column 2, 42 of a plastic material

24 and the like located on each of the enlarged sections.

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1 A Having an edge.

2 Q -- which is the third paragraph of claim 1.

3 A Yes, plastic edge at the edge of the diaper. 24

4 on the left, I believe.

5 MR. MANZO: Now, your question is directed to what

6 number in the figures does that --

7 MR. SMITH: If there is a number, that's what I was

8 asking.

9 THE WITNESS: Yes, I would have to say the plastic

10 layer edge, if you're referring to a number, it's figure

11 2 on the left-hand side, No. 24.

12 MR. SMITH: Q And could you point to the edge or

13 give me the number in figure 4?

14 A Excuse me one moment.

15 Q Sure.

16 A You're saying in figure 4. The plastic layer

17 edge appears to be -- Let me double-check.

18 I would have to say it's within -- it's this

19 edge right here. I don't know if I could mark that

20 edge.

21 Q Is there a number associated with --

22 A It's hard to say on this copy because the black

23 is very, very bold. I'm not sure where the black starts

24 or where it ends. But if I could just point to it, if

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1 But then it says 22 in figure 2, enlarged section of 22.

2 So I would have to say it is described 34,

3 column 2, 42 of plastic material and the like located on

4 each of the enlarged sections.

5 Q Okay. So the portion of the written description

6 that refers to a plastic layer having an edge at the

7 edge of the diaper is referenced here as item 42 in

8 figure 4; is that correct?

9 A It is claiming it to be plastic material and the

10 like. Where it talks about the edge, of course, is what

11 is -- what's in actually the claims themselves. I would

12 have to read the entire descriptions all over again. I

13 don't have them memorized.

14 MR. MANZO: Counsel, do you want to invite her

15 attention to where it says edge?

16 THE WITNESS: The diaper 2 in its flat configuration

17 as shown in figure 2 is formed as a single body 20

18 having enlarged end portions 22 which terminate at edges

19 24 from that top waistband portion 10 in figure 1.

20 So I believe it is covered in column 2, 16, 17

21 and 18. Is that what we were --

22 MR. SMITH: Q Now, you mentioned No. 24 with

23 reference to figure 2.

24 A Let me see. Yes, I mentioned that earlier, 24

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<p style="text-align: right;">162</p> <p>1 on the left.</p> <p>2 Q Yes.</p> <p>3 A And it describes it terminate at the edges 24.</p> <p>4 Q And in column --</p> <p>5 A I just feel a little pressured right now</p> <p>6 because, you know, it has to be in here. I'm just not</p> <p>7 picking it up right at the moment in the description.</p> <p>8 Q If I could direct your attention to line --</p> <p>9 looks like line 28 in my copy, it is the paragraph in</p> <p>10 column 2 that starts "referring now to figures 1, 2 and</p> <p>11 4."</p> <p>12 A Uh-huh.</p> <p>13 Q Do you see where it refers to border sections</p> <p>14 40, 42?</p> <p>15 A Yes, and I mentioned 42 earlier.</p> <p>16 Q Correct. So I just wanted to confirm that the</p> <p>17 plastic layer having an edge at the edge of the diaper,</p> <p>18 we're talking about here, the section 42?</p> <p>19 A Yes, that's what I had mentioned earlier.</p> <p>20 Q Okay.</p> <p>21 A Okay.</p> <p>22 Q Can you direct my attention in the figures to</p> <p>23 the soft padding member that is described in claim 1?</p> <p>24 A Soft padding member would be 24 here, the inside</p>	<p style="text-align: right;">164</p> <p>1 50 on the left, 24 on the right.</p> <p>2 Q So that's the soft padding member of claim 1?</p> <p>3 A Correct.</p> <p>4 Q Can you direct my attention to where in the</p> <p>5 specification it refers to the padding being between the</p> <p>6 top sheet and the back sheet?</p> <p>7 A You want me to point it out in the figures?</p> <p>8 Q The written description of the patent.</p> <p>9 A At least -- I'm going to claim 1, starting with</p> <p>10 paragraph 3, at least two body portion layers, including</p> <p>11 a layer of liquid absorbent material and a plastic layer</p> <p>12 having an edge at the edge of the diaper.</p> <p>13 Q Excluding the claims, which we're going through</p> <p>14 one by one. Not looking at the claims, looking at the</p> <p>15 column 1 and column 2, up until the claims start, where</p> <p>16 in that portion of the written description --</p> <p>17 A Oh, I see, before the claims.</p> <p>18 Q Exactly.</p> <p>19 A I'm sorry.</p> <p>20 Q That's okay.</p> <p>21 A Summary of the invention. Okay, I did find it.</p> <p>22 It's in the summary, to answer your question.</p> <p>23 When you talk about specific summary of the</p> <p>24 invention, going down to column 1, line 44, the</p>
<p style="text-align: right;">163</p> <p>1 of the diaper as it's shown in figure 2. And here it is</p> <p>2 reflected 50, figure 2, as well.</p> <p>3 Q And when you're talking about the inside of the</p> <p>4 diaper --</p> <p>5 A Inside the waistband.</p> <p>6 Q Inside the waistband that would be in contact</p> <p>7 with the wearer?</p> <p>8 A That would be in contact with the wearer,</p> <p>9 correct.</p> <p>10 Q Okay.</p> <p>11 A Wait a minute. Are you talking about claim No.</p> <p>12 1?</p> <p>13 Q That's what we were referring to. I was asking</p> <p>14 about the soft padding member.</p> <p>15 A The soft padding member in claim 1 is inside of</p> <p>16 the diaper waistband. It's not in contact with the</p> <p>17 wearer.</p> <p>18 Q I was asking you where --</p> <p>19 A It is still here within the waistband portion on</p> <p>20 figure 2.</p> <p>21 Q Figure 2 shows the padding within the waistband</p> <p>22 meeting between the top and the back sheet?</p> <p>23 A Well, it's described in the waistband portion,</p> <p>24 and that's where the waistband portion is, 24 and 50.</p>	<p style="text-align: right;">165</p> <p>1 protection provided by the padding not only exists</p> <p>2 within the waistline portion of the diaper, but is also</p> <p>3 present at the top and outside of the diaper where the</p> <p>4 skin may overlap when worn. So it says exists within</p> <p>5 the waistline portion.</p> <p>6 Q Can I direct your attention to the second</p> <p>7 sentence of the summary of the invention.</p> <p>8 A Uh-huh.</p> <p>9 Q Could you read that second sentence for me?</p> <p>10 A The padding as herein disclosed covers the</p> <p>11 plastic waistline band from inside to outside of the</p> <p>12 diaper when worn by the baby.</p> <p>13 Q And that inside to outside is referring to</p> <p>14 inside being the surface touching the baby going to the</p> <p>15 outside, which would be the back sheet?</p> <p>16 A Claim 3, yes.</p> <p>17 Q And so the padding would be going inside to</p> <p>18 outside in that feature?</p> <p>19 A Yes.</p> <p>20 Q That's not talking about padding in between the</p> <p>21 back sheet and the top sheet; is that correct?</p> <p>22 A Correct. That's where it's describing claim 3,</p> <p>23 from inside to outside.</p> <p>24 Q So it's your understanding that the last</p>

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<p style="text-align: right;">166</p> <p>1 sentence of paragraph 1 of the summary of the invention</p> <p>2 indicates that the within the waistline is talking about</p> <p>3 the padding being actually between the top sheet and the</p> <p>4 back sheet; is that correct?</p> <p>5 A That's what within is, yes.</p> <p>6 Q But that's your understanding?</p> <p>7 A Yes.</p> <p>8 Q Okay. Maybe you can help me understand. The</p> <p>9 last sentence of the first paragraph of the summary of</p> <p>10 invention states that the protection provided by the</p> <p>11 padding not only exists within the waistline portion of</p> <p>12 the diaper, but is also present at the top and outside</p> <p>13 of the diaper where the skin may overlap when worn.</p> <p>14 A It's talking about two different areas I believe</p> <p>15 there.</p> <p>16 Q Could you describe the two different areas that</p> <p>17 you're talking about?</p> <p>18 A The protection provided by the padding not</p> <p>19 only -- so he's saying it's not exclusive to that -- not</p> <p>20 only exists within the waistline portion, within being</p> <p>21 inside of the diaper, but also -- so it means in</p> <p>22 addition to -- present at the top and the outside of the</p> <p>23 diaper where the skin may be overlap -- where the skin</p> <p>24 may overlap when worn.</p>	<p style="text-align: right;">168</p> <p>1 front to back. Inside or within -- within something is</p> <p>2 inside something. So within isn't the same as going</p> <p>3 from front to back as we were describing earlier, the</p> <p>4 inside to the outside portion.</p> <p>5 Q Claim 3, however, states that its said first</p> <p>6 strip wraps around the inside to the outside of the</p> <p>7 waistband; whereas the sentence, as you have interpreted</p> <p>8 it, doesn't cover padding on the inside of the</p> <p>9 waistband; is that correct?</p> <p>10 A Well, he calls it inside of the waistline</p> <p>11 portion, and that's where your waistband usually is, is</p> <p>12 at the waistline portion. It's not in your abdomen.</p> <p>13 It's not in your hip. It's at the waistline portion.</p> <p>14 Q Right. The question I was getting towards was</p> <p>15 more the statement you had made where it covers both</p> <p>16 claim 1 and claim 3, and you're referring to the last</p> <p>17 sentence of the summary of the invention, paragraph 1.</p> <p>18 A Correct.</p> <p>19 Q My question was with respect to claim 3. Claim</p> <p>20 3 states that it's covering a padding that goes from the</p> <p>21 inside to the outside. So it covers the portion of the</p> <p>22 diaper where the skin of the baby would be wearing it to</p> <p>23 the outside of the diaper where someone could be</p> <p>24 touching it, the back sheet say of the diaper.</p>
<p style="text-align: right;">167</p> <p>1 Q The portion of the sentence that starts with</p> <p>2 "but is also," that's referring to the padding that</p> <p>3 would be on top of the edge of the diaper and also on</p> <p>4 the portion of the diaper that would be on the back</p> <p>5 sheet; is that correct?</p> <p>6 A Correct.</p> <p>7 Q So this sentence, according to you, is not</p> <p>8 referring to any portion of the padding that would be in</p> <p>9 contact with the wearer?</p> <p>10 A I'm not saying that. I said that this last</p> <p>11 paragraph reads that it's not only within the waistline.</p> <p>12 That's not the only place where it exists. But it also</p> <p>13 is present at the top and the outside of the diaper</p> <p>14 where the skin may overlap when worn.</p> <p>15 I think it's very specific. You know, it's</p> <p>16 talking about it's not only inside but also -- he's</p> <p>17 talking about claim No. 3 -- going from the inside to</p> <p>18 the outside as well. They're two different features.</p> <p>19 Q So the distinction being made in that sentence</p> <p>20 is that the padding can be inside the top sheet or the</p> <p>21 back sheet, or it can be on top of the plastic edge, or</p> <p>22 it can be on the back sheet?</p> <p>23 A He is covering both claim 1 and claim 3 in that</p> <p>24 particular paragraph, because inside is definitely not</p>	<p style="text-align: right;">169</p> <p>1 A Again, I just want to say this is the summary.</p> <p>2 You know, when you summarize, you don't include every</p> <p>3 single word that is in your -- let's say a report of</p> <p>4 something you were doing; whether it be for school or</p> <p>5 for somewhere else.</p> <p>6 Your summary is just condensed to summarize.</p> <p>7 It doesn't have everything specifically outlined,</p> <p>8 otherwise it wouldn't be a summary. So that's how I</p> <p>9 answer that.</p> <p>10 Q That last sentence though, is it your</p> <p>11 interpretation that the last sentence just doesn't cover</p> <p>12 padding that would be on the inside of the waist portion</p> <p>13 touching the wearer?</p> <p>14 A It says -- I believe it says -- This is how I</p> <p>15 interpret it. I interpret it to say that it exists</p> <p>16 within the waistline portion. So it's within. It's</p> <p>17 inside of that waistline portion.</p> <p>18 Q But not touching it?</p> <p>19 A That one, that part is not touching when it's</p> <p>20 within.</p> <p>21 Q Okay.</p> <p>22 A The other part of the same sentence, where it</p> <p>23 says but it is also present, covers claim 3 where it's</p> <p>24 going from inside to outside, which does touch.</p>

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<p style="text-align: right;">170</p> <p>1 Q What portion of that sentence covers the padding</p> <p>2 that would be touching the child on the inside of the</p> <p>3 waistline?</p> <p>4 A Well, it's where it says but also present at the</p> <p>5 top and outside of the diaper, within the waistline</p> <p>6 portion, but is also present at the top and the outside</p> <p>7 when it overlaps, when it's worn. Your skin can touch</p> <p>8 it at the top when it's overlapping.</p> <p>9 Q My question was directed to what portion of that</p> <p>10 sentence refers to the padding claimed in claim 3 that</p> <p>11 refers to the inside of the waistband portion that would</p> <p>12 be touching the wearer of the diaper.</p> <p>13 A Well, he's talking about -- Let me read this</p> <p>14 again.</p> <p>15 Well, it doesn't say at the top edge. It says</p> <p>16 at the top. So when you're talking about the waistline,</p> <p>17 it could be the top of the waistline area. It doesn't</p> <p>18 say the edge of the waistline area. So it says at the</p> <p>19 top of the waistline area. So if this were the top of</p> <p>20 the waistline area, that would be touching the skin.</p> <p>21 Q So you're interpreting top to be the inside of</p> <p>22 the --</p> <p>23 A Not --</p> <p>24 Q -- diaper, meaning the top layer?</p>	<p style="text-align: right;">172</p> <p>1 layer?</p> <p>2 A And it's not in the claims, okay.</p> <p>3 Q Correct.</p> <p>4 A Here we go. I just came upon it.</p> <p>5 Okay. Column 2, line 10, one or more layers</p> <p>6 18, figs 3 and 4, of a liquid absorbent material, such</p> <p>7 as cotton, pulp and the like, is imposed -- is imposed</p> <p>8 between, excuse me, the outer sheet and the inner</p> <p>9 sheet -- the outer sheet 16A and the inner sheet 16B as</p> <p>10 is conventional.</p> <p>11 Q Isn't that talking about the liquid absorbent</p> <p>12 material --</p> <p>13 A It is.</p> <p>14 Q -- not the --</p> <p>15 A Because as I read on, it said crotch area. I</p> <p>16 spoke too soon, excuse me.</p> <p>17 Q That's okay.</p> <p>18 MR. MANZO: Can we go off the record while she</p> <p>19 completes her review?</p> <p>20 THE WITNESS: Yes, I would like to because when I'm</p> <p>21 hearing talking, I'm listening.</p> <p>22 THE VIDEOGRAPHER: Off the record 3:58.</p> <p>23 (Recess was taken.)</p> <p>24 THE VIDEOGRAPHER: On the record 4:08.</p>
<p style="text-align: right;">171</p> <p>1 A Just the top part of this waistband area. I</p> <p>2 mean, it's not specific to say that it's just the edge.</p> <p>3 It's saying the top of the waistline portion.</p> <p>4 In which you say this is the top of the</p> <p>5 waistline portion and this is the bottom of the</p> <p>6 waistline portion, I'm referring to it as this is the</p> <p>7 top of the waistline portion.</p> <p>8 Q Where else in the specification -- again, we're</p> <p>9 talking about column 1 and column 2, not including the</p> <p>10 claims -- where it refers to the padding or the soft</p> <p>11 padding member being between the top layer and the back</p> <p>12 layer?</p> <p>13 A You're not talking about the claims.</p> <p>14 Q Correct.</p> <p>15 A I'm going to take a moment to refresh myself,</p> <p>16 okay?</p> <p>17 Q Sure.</p> <p>18 A Thank you. May I use your highlighter for one</p> <p>19 moment?</p> <p>20 I'm going to stop right here. Could you ask me</p> <p>21 the question again so I'm thinking of it as I'm reading?</p> <p>22 Q The question was, where in the written</p> <p>23 description of the patent does it talk about putting the</p> <p>24 soft padding member between the top layer and the back</p>	<p style="text-align: right;">173</p> <p>1 THE WITNESS: First of all, I want to apologize.</p> <p>2 I'm getting very tired.</p> <p>3 MR. SMITH: Q That's quite all right. We're</p> <p>4 almost finished.</p> <p>5 A To answer your question, no, it doesn't</p> <p>6 specifically say. You had asked me --</p> <p>7 Q Okay. So there's no specific reference in</p> <p>8 column 1 or column 2, excluding the claims --</p> <p>9 A Correct.</p> <p>10 Q -- that refers to placing the padding material</p> <p>11 between the top sheet and the back sheet along the</p> <p>12 waistline?</p> <p>13 A Correct.</p> <p>14 Q I'd like to direct your attention to claim No.</p> <p>15 10, which is located in column 3 down at the bottom of</p> <p>16 the column.</p> <p>17 Do you see the second paragraph that starts</p> <p>18 "attachment devices"?</p> <p>19 A Yes.</p> <p>20 Q Do you see the portion of that sentence that</p> <p>21 reads said diaper may be closed about a waist and crotch</p> <p>22 of a wearer and have an inside and an outside with</p> <p>23 respect to the wearer?</p> <p>24 A Yes.</p>

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1 Q The inside and outside referred to there is
2 referring to the inside of the diaper that would be
3 touching the wearer, and then the outside of the diaper,
4 which would be on the back sheet; is that correct?

5 A Correct.

6 MR. MANZO: The inside is the part that gets wet
7 first.

8 MR. SMITH: Q I'd like to now direct your attention
9 to the last paragraph of claim 10 that starts "a first
10 soft padding member." Do you see that?

11 A Uh-huh.

12 Q Is there a reference in the written description
13 of the patent, excluding the claims, that refers to the
14 soft padding member of claim 10?

15 MR. MANZO: Are you asking in ipissima verbis?

16 MR. SMITH: Come again?

17 MR. MANZO: Are you asking whether those explicit
18 words are in the specification?

19 MR. SMITH: Q Did you understand the question?

20 A Could you just repeat it for me again, please?

21 Q Sure. Let's see if I can clear up any
22 confusion.

23 A I'm not confused, but it would be better if you
24 just ask it again.

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1 the inside of said diaper with respect to the wearer,
2 thereby to a present a soft surface at said inside of
3 the diaper waistband despite the plastic material at the
4 edge of the body portion.

5 So if it says inside of the diaper waistband,
6 you know, I would take that literally that it's inside
7 of the waistband area. And they're speaking strictly of
8 the waistband. Did I answer your question?

9 Q I don't think so.

10 A I don't think I did either.

11 Q Let's try it again.

12 A Okay.

13 Q The portion that I'm looking at says inside of
14 said diaper with respect to the wearer. Do you see
15 that?

16 A Uh-huh.

17 Q And what I'm asking, is that referring to the
18 inside of the diaper portion that would be touching the
19 wearer of the diaper?

20 A I understand that, and I would say that it is
21 inside that portion that would be touching the diaper.
22 I mean that would be touching the individual, excuse me.

23 Q That's okay. So the soft padding member would
24 be located on the portion of the waistband that would be

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1 Q Certainly. I just want to direct your attention
2 to the last paragraph of claim 10, which starts "a first
3 soft padding member." Do you see that?

4 A Yes, I do.

5 Q Do you see the portion of that paragraph that
6 states the soft padding member being located at
7 substantially only along the waistband at the inside of
8 said diaper with respect to the wearer, thereby to
9 present a soft surface at said inside of the diaper
10 waistband despite the plastic material at the edge of
11 the body portion?

12 A Yes, I'm reading that.

13 Q When it's referring to the inside of said
14 diaper, are we talking again about the inside portion of
15 the diaper that would be in contact with the wearer of
16 the diaper?

17 A Give me a moment.

18 Q Certainly.

19 A Well, it says here, if I may answer you
20 correctly, that it is at the inside of said diaper.

21 Just above that he is explaining the waistband
22 portion. So I would have to believe that the soft
23 padding member, right after that, where it continues
24 being located substantially only along the waistband at

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1 touching the wearer so that the padded member touches
2 the wearer of the diaper?

3 A I believe when it says --

4 MR. MANZO: Objection. You're really asking for a
5 legal conclusion here when you're asking this witness to
6 interpret patent claims.

7 My objection is registered. Go ahead and
8 answer.

9 THE WITNESS: Okay. If I may make a distinction,
10 claim 15, since we're talking about claims, okay, it
11 talks about one strip of material forming a soft surface
12 for contact with the skin of the individual at at least
13 one of the border edges. I would say that that is very
14 specific where it says in contact with the skin of the
15 individual.

16 Here it is saying inside. It says only along
17 the waistband at the inside of said diaper. It's not
18 saying that it's particularly behind a bat. It's not
19 saying that it's -- it's inside of the diaper. I would
20 say, itself. And it could be interpreted to be inside
21 of the waistband -- I'm going to go along with Mr. Manzo
22 on this one, if I may answer in that fashion, and I
23 think it's because I am getting extremely tired and I am
24 not thinking as well as I should right now.

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<p style="text-align: right;">178</p> <p>1 Substantially only at the waistband at the</p> <p>2 inside of said diaper with respect to the wearer,</p> <p>3 thereby to present a soft surface at said inside of the</p> <p>4 diaper waistband. It says -- again, it re-emphasizes</p> <p>5 two lines down that it's inside of the diaper waistband.</p> <p>6 So if I may demonstrate, this is the diaper</p> <p>7 waistband portion here, and it's said to be inside of</p> <p>8 that. That's my answer.</p> <p>9 MR. SMITH: Q Does that interpretation make sense</p> <p>10 in light of the language that says inside of said diaper</p> <p>11 with respect to the wearer?</p> <p>12 A The one who's wearing it, with respect to the</p> <p>13 wearer.</p> <p>14 Q Doesn't that refer, though, to the inside of the</p> <p>15 diaper portion that would be touching the wearer, such</p> <p>16 that the soft padding member would touch the wearer?</p> <p>17 MR. MANZO: Objection, argumentative.</p> <p>18 THE WITNESS: The only way I can say is, again, you</p> <p>19 know, inside of the diaper. I don't know if you want to</p> <p>20 put limitations on the word inside or not, and that's</p> <p>21 how I'm going to answer that, not being a patent</p> <p>22 attorney. So that's how I can best answer it.</p> <p>23 MR. SMITH: Q Does this inside refer to the term</p> <p>24 inside that you've used with respect to inside the</p>	<p style="text-align: right;">180</p> <p>1 you're going to get a soft surface.</p> <p>2 Q The claim, though, says that it presents a soft</p> <p>3 surface despite the plastic material at the edge. If</p> <p>4 the padding is internal to the waistband meeting between</p> <p>5 the top sheet and the back sheet, how can it provide a</p> <p>6 soft surface to the plastic edge?</p> <p>7 A Okay, I will explain that. When you have a</p> <p>8 plastic edge, just by itself --</p> <p>9 MR. MANZO: Objection, mischaracterizes the claim.</p> <p>10 Proceed.</p> <p>11 THE WITNESS: As I was trying to explain, it's just</p> <p>12 like the edge of a piece of paper. It's sharp when it's</p> <p>13 singularly by itself. You can get a papercut.</p> <p>14 To me, if it's near the plastic edge, that edge</p> <p>15 singularly by itself can be sharp. When you add extra</p> <p>16 layers to it, it's not as sharp. Just as it would be --</p> <p>17 you're less likely to get cut from paper with</p> <p>18 thicknesses of layers together than you are with a</p> <p>19 single layer of paper.</p> <p>20 And I would say that it is not -- to present a</p> <p>21 soft surface despite the plastic material at the edge.</p> <p>22 as I just described to you, when there's more layers at</p> <p>23 that edge, it's going to present a softer surface.</p> <p>24 Q How would the padding material present a soft</p>
<p style="text-align: right;">179</p> <p>1 waistband? Strike that.</p> <p>2 Later in that same sentence it refers to</p> <p>3 present a soft surface.</p> <p>4 A Correct.</p> <p>5 Q And goes on to say despite the plastic material</p> <p>6 at the edge of the body portion.</p> <p>7 A Right.</p> <p>8 Q What does that mean?</p> <p>9 A Let me continue to read that. With respect to</p> <p>10 the wearer, thereby to present a soft surface at the</p> <p>11 inside of the diaper despite the plastic material at the</p> <p>12 edge of the body portion.</p> <p>13 When you have this padding member, which is a</p> <p>14 strip, it's going to present a soft surface. This is</p> <p>15 the surface of the diaper.</p> <p>16 Q You're referring to the --</p> <p>17 A Surface of the waistband.</p> <p>18 Q -- topside?</p> <p>19 A But that doesn't mean it's only -- in my</p> <p>20 interpretation, it doesn't mean it's only limited to.</p> <p>21 It says it's presenting a soft surface. So if</p> <p>22 it's in between layers, it can present a soft surface.</p> <p>23 Or if it's right here, even on the outer-most layer,</p> <p>24 it's going to present a soft surface. So either way</p>	<p style="text-align: right;">181</p> <p>1 surface if the plastic edge is in front of the padding</p> <p>2 material?</p> <p>3 A Well, the plastic edge is actually behind the</p> <p>4 padding material. It's in back of this. If you want to</p> <p>5 say if it's laying open like this, it's underneath. If</p> <p>6 it's like this, it's actually behind it.</p> <p>7 Q Well, the edge portion that we discussed before</p> <p>8 was the portion that is the top layer?</p> <p>9 A This is the edge --</p> <p>10 Q Correct.</p> <p>11 A -- of the diaper. And I'll just continue to say</p> <p>12 that as you have more layers affixed to this edge, it's</p> <p>13 going to be -- there's going to be more cushioning there</p> <p>14 as opposed to just having this plastic edge by itself,</p> <p>15 which would be more sharp as in a single piece of paper.</p> <p>16 Q So if the plastic layer is the top layer, how</p> <p>17 does the soft padding member present a soft surface?</p> <p>18 A Well, it's not really the top layer when it's</p> <p>19 open. And it's actually in back when it's affixed to</p> <p>20 the baby. So you said when the plastic is a top layer?</p> <p>21 It's not really a top layer here.</p> <p>22 Q But in the application you directed my attention</p> <p>23 to the plastic layer or plastic edge being the edge of</p> <p>24 the --</p>

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<p style="text-align: right;">182</p> <p>1 A Oh, it's at the top of the waistband, yes. It's</p> <p>2 at the top of this waistband portion. You know, if this</p> <p>3 is the bottom of the waistband, this is the top of the</p> <p>4 waistband.</p> <p>5 Q Just for the record, this diaper isn't a Confab</p> <p>6 diaper as far as I'm aware.</p> <p>7 A No, I'm just using it to demonstrate waistband</p> <p>8 is all and plastic edges.</p> <p>9 Q Okay.</p> <p>10 MR. MANZO: Can I ask where we stand on time?</p> <p>11 THE VIDEOGRAPHER: We're at an hour-fifteen.</p> <p>12 MR. MANZO: And the total? Seems like we started --</p> <p>13 THE VIDEOGRAPHER: Three hours, plus an</p> <p>14 hour-fifteen.</p> <p>15 MR. SMITH: Q The soft padding member that you've</p> <p>16 described in claim 10, is there any portion of the</p> <p>17 written specification, claims 1 -- column 1 or 2, not</p> <p>18 including the claims, that refer or describe your</p> <p>19 interpretation of the soft padding member of claim 10?</p> <p>20 A Again, it's similar to. I would have to -- like</p> <p>21 I said, I don't memorize all of this, but I understand</p> <p>22 it as I read it.</p> <p>23 So you want to know if claim 10 is really</p> <p>24 within the contents of column 1 or 2 prior to the</p>	<p style="text-align: right;">184</p> <p>1 But what I'm referring to, like in claim 1, was</p> <p>2 the soft padding member being distinct, which means</p> <p>3 separate. And if I said this claim has to mean that</p> <p>4 it's inside the two layers distinctly, I believe I may</p> <p>5 have been incorrect on that.</p> <p>6 I believe what I had in my mind that it's a</p> <p>7 separate strip that is distinct, and it doesn't limit</p> <p>8 itself to saying exactly where it is. So I may have</p> <p>9 been incorrect on that.</p> <p>10 Q And are you talking about claim 10?</p> <p>11 A I'm going back to claim 1, which was I believe</p> <p>12 you asked me the same type of question for claim 1 a</p> <p>13 while back.</p> <p>14 Q Well, with respect to claim 10, is there</p> <p>15 anything in the specification that supports your</p> <p>16 interpretation that the soft padding member can be</p> <p>17 between the top layer and the back layer?</p> <p>18 A I'm not sure, but I don't think it has to be.</p> <p>19 But I don't remember saying distinctly it has to be in</p> <p>20 between the top and the back, but I don't remember that.</p> <p>21 Q You went through the specification during one of</p> <p>22 our breaks, and you said previously that there was</p> <p>23 nothing in --</p> <p>24 A Right.</p>
<p style="text-align: right;">183</p> <p>1 claims?</p> <p>2 Q I was actually more specific than that. It's</p> <p>3 with respect to just the one element of claim 10 that</p> <p>4 refers to the soft padding member as you've interpreted</p> <p>5 that soft padding member. Is there anything in the</p> <p>6 written description of columns 1 and 2 that describes</p> <p>7 that soft padding member as you've interpreted it?</p> <p>8 A It describes the soft padding member other than</p> <p>9 saying it's a soft padding member? You're saying it</p> <p>10 describes the soft padding member, other than the fact</p> <p>11 that it's just saying it's a soft padding member?</p> <p>12 Q Well, you've indicated to me, and correct me if</p> <p>13 I'm wrong, that the soft padding member could lie</p> <p>14 between the top layer and the back layer --</p> <p>15 A Correct.</p> <p>16 Q -- is that correct?</p> <p>17 A Correct.</p> <p>18 Q Where in the specification does that description</p> <p>19 of the padding being between the top layer and the back</p> <p>20 layer occur?</p> <p>21 A Well, as I believe I answered that earlier, I'm</p> <p>22 not so sure if I answered that correctly now, now that I</p> <p>23 hear it again. So I'm not so sure. I'd have to go back</p> <p>24 and see how I answered that.</p>	<p style="text-align: right;">185</p> <p>1 Q -- the specification that says --</p> <p>2 A Right.</p> <p>3 Q -- that the soft padding member can be between</p> <p>4 the top layer and back layer.</p> <p>5 A And I'll still claim that answer.</p> <p>6 Q Just wanted to make sure.</p> <p>7 A Uh-huh.</p> <p>8 Q I'd now like to direct your attention to claim</p> <p>9 15. And going down to the paragraph that starts "the</p> <p>10 waistband, including a padding member." Do you see</p> <p>11 that?</p> <p>12 A Yes.</p> <p>13 Q Does that call for the padding member to be in</p> <p>14 contact with the wearer of the diaper?</p> <p>15 MR. MANZO: When you say "does that," you mean that</p> <p>16 subparagraph or this claim?</p> <p>17 MR. SMITH: Q Do you understand the question?</p> <p>18 A You're saying does that paragraph itself mean</p> <p>19 that it has to be in contact with the wearer?</p> <p>20 MR. MANZO: I object to the question as vague.</p> <p>21 MR. SMITH: Q What do you think that paragraph</p> <p>22 means?</p> <p>23 A Well, it is -- your question is vague, but I</p> <p>24 would say that -- if I could answer it as best as I can.</p>

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<p style="text-align: right;">186</p> <p>1 Q I'd appreciate that.</p> <p>2 A It is just describing I think where the padding</p> <p>3 member is. It's at the edge portion of the exposed</p> <p>4 surface of the waistband.</p> <p>5 It's at the edge portion of the exposed</p> <p>6 surface. So I'm not sure I could limit it to saying</p> <p>7 that it's -- that it is or it isn't in contact with the</p> <p>8 wearer.</p> <p>9 Q Does it require that the padding be in contact</p> <p>10 with the wearer?</p> <p>11 A Two paragraphs down it does. But that</p> <p>12 particular paragraph doesn't specifically say contact</p> <p>13 with the wearer. No, it doesn't say that.</p> <p>14 Q And you mention that the last paragraph of claim</p> <p>15 15 requires that the soft padding member be in contact</p> <p>16 with the skin of the wearer; is that correct?</p> <p>17 A Yes, it's for contact with the skin of the</p> <p>18 individual. Does it require? I mean, I think it</p> <p>19 explains it. That's what that claim is referring to,</p> <p>20 contact with the skin, yes.</p> <p>21 Q Okay. And that is disclosed in your figures 1</p> <p>22 through 4; is that correct?</p> <p>23 A Well, yes.</p> <p>24 Q So those figures show that the soft padding</p>	<p style="text-align: right;">188</p> <p>1 in claim 1 of the patent; is that correct?</p> <p>2 A There is not a separate strip that is distinct</p> <p>3 as you continue on in claim 1, no, I don't see -- unless</p> <p>4 I'm missing it, but there doesn't appear to be a</p> <p>5 distinct strip.</p> <p>6 Q According to claim 10, is there a soft padding</p> <p>7 member in that diaper which has been marked as Exhibit</p> <p>8 20?</p> <p>9 A Let me read claim 10. There is no strip of a</p> <p>10 soft substance located at the waistband. There's no</p> <p>11 strip. I'm referring to a strip, and there is none</p> <p>12 located at the waistband in claim 10 as it says.</p> <p>13 Q So there's no soft padding member as described</p> <p>14 in claim 10?</p> <p>15 A Well, in claim 10 it also says the first soft</p> <p>16 padding member, including a strip. So you have to take</p> <p>17 those words together, soft padding member, including a</p> <p>18 strip. There doesn't appear to be one.</p> <p>19 Q Okay. Looking at claim 15, does that diaper</p> <p>20 have a padding member extending along an opposite edge</p> <p>21 portion at an exposed surface of the waistband?</p> <p>22 A I'm sorry, where are you at claim 15? I was</p> <p>23 down here.</p> <p>24 Q That's all right.</p>
<p style="text-align: right;">187</p> <p>1 member would be in contact with the skin of the wearer;</p> <p>2 is that correct?</p> <p>3 A Yes, not limited to that, but containing.</p> <p>4 Q But that's what they show?</p> <p>5 A That particular aspect, yes.</p> <p>6 Q I'd like to show you a diaper. I'm sure you've</p> <p>7 already seen too many today. And I'd like you to refer</p> <p>8 to claim 1 of the '824 patent, which is Exhibit 1.</p> <p>9 A Uh-huh.</p> <p>10 MR. SMITH: And could I mark that diaper as Exhibit</p> <p>11 20.</p> <p>12 (Document marked as requested.)</p> <p>13 MR. MANZO: Is this a Confab diaper?</p> <p>14 MR. SMITH: It is what it is.</p> <p>15 MR. MANZO: Does it have a production number?</p> <p>16 MR. SMITH: We'll put a sticker on it. Thank you.</p> <p>17 In looking at claim 1 of the '824 patent --</p> <p>18 MR. MANZO: Can I see it?</p> <p>19 MR. SMITH: Q Can you show me where on that diaper</p> <p>20 the soft padding member is located?</p> <p>21 A There doesn't seem to be -- Let me be careful</p> <p>22 before I answer. Just to make sure, there doesn't seem</p> <p>23 to be any soft padding member at the waistband.</p> <p>24 Q So there's no soft padding member as described</p>	<p style="text-align: right;">189</p> <p>1 A I was somewhere else, I'm sorry.</p> <p>2 Q I'm down at the paragraph that starts the</p> <p>3 "waistband, including."</p> <p>4 A The waistband, including a plastic material at</p> <p>5 the border edges?</p> <p>6 Q I'm sorry, further down. It starts "the</p> <p>7 waistband, including a padding member."</p> <p>8 A "Extending along the opposite edge portion at an</p> <p>9 exposed surface of the waistband." I would say that</p> <p>10 that particular aspect is not in this diaper.</p> <p>11 Q Okay. This is the last diaper you'll probably</p> <p>12 see today.</p> <p>13 A Does that mean no more questions after this one?</p> <p>14 MR. SMITH: I'd like to mark this as Defendant's</p> <p>15 Exhibit 21.</p> <p>16 (Document marked as requested.)</p> <p>17 MR. MANZO: Another mystery diaper.</p> <p>18 THE WITNESS: May I begin tearing? I might as well</p> <p>19 get a head start. Go ahead.</p> <p>20 MR. SMITH: Q Referring to claim 1 of the '824</p> <p>21 patent, which is marked as Defendant's Exhibit 1, can</p> <p>22 you locate for me the soft padding member in the diaper</p> <p>23 marked as Defendant's Exhibit 21?</p> <p>24 A Okay. Can I show you the soft padding member?</p>

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<p style="text-align: right;">190</p> <p>1 Let me see here. I'm getting good at this.</p> <p>2 Oh, yes, I would say this is the soft padding</p> <p>3 member right here. It's a strip and it is distinct.</p> <p>4 Right there.</p> <p>5 Q So the portion that you're referring to was</p> <p>6 located between the top layer and the back layer; is</p> <p>7 that correct?</p> <p>8 A Correct, correct. yes, it's located in between.</p> <p>9 Q And is that soft padding member adjacent to said</p> <p>10 plastic layer edge?</p> <p>11 A Yes, it's next to it.</p> <p>12 Q You said it's next to it. Is that --</p> <p>13 A Yes, it's right -- it's next to it.</p> <p>14 Q You're saying that's adjacent to the plastic</p> <p>15 edge?</p> <p>16 A Yes, yes.</p> <p>17 MR. MANZO: For about the tenth time. yes.</p> <p>18 MR. SMITH: Q And does that soft padding member</p> <p>19 present a soft surface along at least a portion of said</p> <p>20 inside of the diaper waistband portion despite the</p> <p>21 plastic edge?</p> <p>22 A Yes.</p> <p>23 Q And why does it do that?</p> <p>24 A Well, as I explained earlier, and I'll be happy</p>	<p style="text-align: right;">192</p> <p>1 A Yes.</p> <p>2 Q Despite the fact that there is a back sheet</p> <p>3 between the soft padding member and the wearer of the</p> <p>4 diaper?</p> <p>5 A A back sheet between the soft padding member?</p> <p>6 Q And the wearer of the diaper.</p> <p>7 A A back sheet between?</p> <p>8 Q Or I should say -- I'm sorry.</p> <p>9 A Yes.</p> <p>10 Q I'm confusing you.</p> <p>11 A Yes, a back sheet between.</p> <p>12 Q I apologize. I just wanted to make sure I was</p> <p>13 correct that you're saying that this diaper presents a</p> <p>14 soft surface despite the fact that the soft padding</p> <p>15 member is between the top layer and the wearer of the</p> <p>16 diaper?</p> <p>17 A Absolutely.</p> <p>18 MR. MANZO: I might be getting confused here, but I</p> <p>19 wonder whether we've switched the top sheet and back</p> <p>20 sheet between different interrogators?</p> <p>21 MR. SMITH: Q I don't think so. I think my</p> <p>22 previous question was a little confusing because I</p> <p>23 switched it, but I think you understood --</p> <p>24 A Yes.</p>
<p style="text-align: right;">191</p> <p>1 to repeat, the top layer -- excuse me, the top plastic</p> <p>2 edge here is sharper when standing alone by itself, as</p> <p>3 in a piece of paper. When you affix layers to it, it</p> <p>4 becomes not as sharp.</p> <p>5 Q And does it present a soft surface?</p> <p>6 A Yes.</p> <p>7 Q And how does it do that?</p> <p>8 A When you add padding to something, it makes it</p> <p>9 more comfortable. And by touch I can tell it has a soft</p> <p>10 surface.</p> <p>11 Q But you're touching the padding member.</p> <p>12 A Even the layer that goes over the padding</p> <p>13 member, when you first touch it, it appears to present a</p> <p>14 soft surface.</p> <p>15 Q So you're saying that the back sheet presents</p> <p>16 the soft surface to the wearer; is that correct?</p> <p>17 A I'm saying that this diaper, this waistband, is</p> <p>18 presenting a soft surface.</p> <p>19 Q And I'm asking how it does that?</p> <p>20 A Because it provides padding, some extra</p> <p>21 cushioning. Being as thin as it is, it's still a little</p> <p>22 cushioning.</p> <p>23 Q It's your testimony that the soft padding member</p> <p>24 is presenting a soft surface?</p>	<p style="text-align: right;">193</p> <p>1 Q -- the follow-up question, right, where I</p> <p>2 cleared it up?</p> <p>3 A It's still presenting a soft surface whether</p> <p>4 it's behind this first layer that I pulled apart.</p> <p>5 Q And the first layer you pulled apart is the top</p> <p>6 layer, correct?</p> <p>7 A Yes.</p> <p>8 Q Looking at claim 10, does that diaper marked</p> <p>9 Defendant's Exhibit 21 have a first soft padding member</p> <p>10 as described in claim 10?</p> <p>11 A And where are you at, I'm sorry?</p> <p>12 Q That's okay. It's the last paragraph of claim</p> <p>13 10, starting on line 4 of column 4.</p> <p>14 A Okay. The soft padding member -- are you</p> <p>15 talking about the first -- did I hear you say first soft</p> <p>16 padding member?</p> <p>17 Q That's correct.</p> <p>18 A Yes.</p> <p>19 Q And why is that?</p> <p>20 A Well, it is a soft padding member undeniably.</p> <p>21 And if you -- well, it depends on where you're looking</p> <p>22 at the diaper I suppose, but opened up you have your</p> <p>23 back sheet, and then you have your first member, your</p> <p>24 first padding member on top of that, and then you have a</p>

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<p style="text-align: right;">194</p> <p>1 layer on top of that of a batting.</p> <p>2 Q And when you're --</p> <p>3 A Opened up padding member.</p> <p>4 Q You're talking about different layers. Could</p> <p>5 you describe the actual layers you're talking about?</p> <p>6 You can use the same words we've been using, top layer,</p> <p>7 back layer, padding member.</p> <p>8 A This is a plastic, you know, back sheet, if you</p> <p>9 want to call it that, layer number one. This padding</p> <p>10 member at the waistband, this is the first padding</p> <p>11 member.</p> <p>12 This may be, if you want to call it, a layer or</p> <p>13 a piece, but this is the first padding member on top of</p> <p>14 the back sheet. And this is another layer of a top</p> <p>15 sheet. This is actually a padding member here.</p> <p>16 Q And, again, according to claim 10, does this</p> <p>17 diaper present a soft surface at said inside of the</p> <p>18 diaper waistband despite the plastic material at the</p> <p>19 edge of the body portion?</p> <p>20 A Yes. It's a soft surface inside, yes.</p> <p>21 Q And can you describe again why that's true or</p> <p>22 why you believe it's true?</p> <p>23 A Are you referring to the edge again?</p> <p>24 Q I'm referring to the last portion of the last</p>	<p style="text-align: right;">196</p> <p>1 Q Okay. Going to claim 15, does this diaper have</p> <p>2 a padding member extending along an opposite edge</p> <p>3 portion at an exposed surface of the waistband?</p> <p>4 A And again you are where in 15? I'm sorry.</p> <p>5 Q That's all right. I'm starting with the</p> <p>6 paragraph that says "the waistband, including a padding</p> <p>7 member."</p> <p>8 A Extending along an opposite edge?</p> <p>9 Q Correct.</p> <p>10 A Correct.</p> <p>11 Q Do you see that paragraph?</p> <p>12 A Yes.</p> <p>13 Q And does the diaper marked as Defendant's</p> <p>14 Exhibit 21 have the waistband, including a padding</p> <p>15 member, extending along an opposite edge portion at an</p> <p>16 exposed surface of the waistband?</p> <p>17 A Yes.</p> <p>18 Q And why is that?</p> <p>19 A Because the waistband has padding member. It</p> <p>20 extends along the opposite edge portion at an exposed</p> <p>21 surface of the waistband. I guess you can maybe call</p> <p>22 this an exposed surface or this top surface of the</p> <p>23 waistband.</p> <p>24 Q So you're calling the top edge to be the exposed</p>
<p style="text-align: right;">195</p> <p>1 paragraph of claim 10.</p> <p>2 A Despite the plastic material at the edge of the</p> <p>3 body portion?</p> <p>4 Q I was asking you, does the diaper marked</p> <p>5 Defendant's Exhibit 21 present a soft surface at said</p> <p>6 inside of the diaper waistband despite the plastic</p> <p>7 material at the edge of the body portion?</p> <p>8 A Yes.</p> <p>9 Q And why is that?</p> <p>10 A As I said earlier, again, it's adjacent to the</p> <p>11 plastic edge.</p> <p>12 Q Which you're referring to as the back sheet?</p> <p>13 A Yes.</p> <p>14 Q Okay.</p> <p>15 A And the plastic edge being right here at the</p> <p>16 top. And the more layers you affix to it, the less</p> <p>17 sharp, I guess you could say, it is if you want to</p> <p>18 describe it as that. So that's why it does present a</p> <p>19 soft surface.</p> <p>20 Q And the diaper presents a soft surface even</p> <p>21 though the soft padding member is between the top sheet</p> <p>22 and the skin of the wearer of the diaper?</p> <p>23 A Yes, because it's still next to the plastic</p> <p>24 layer edge.</p>	<p style="text-align: right;">197</p> <p>1 surface?</p> <p>2 A Yes.</p> <p>3 Q Okay. And does this diaper marked as</p> <p>4 Defendant's Exhibit 21 have a soft surface for contact</p> <p>5 with the skin of the individual at at least one of the</p> <p>6 border edges?</p> <p>7 A Yes.</p> <p>8 Q Does it have a strip of material forming a soft</p> <p>9 surface for contact with the skin of the individual at</p> <p>10 at least one of the border edges?</p> <p>11 A Yes.</p> <p>12 Q And can you show me that?</p> <p>13 A Well, here's a border edge. The strip of</p> <p>14 material is right there next to, or adjacent to, the</p> <p>15 border edge.</p> <p>16 I'm sorry, where are you at?</p> <p>17 Q That's okay. I'll direct your attention to the</p> <p>18 last two paragraphs of claim 15. And they read, the</p> <p>19 padding member, including at least one strip of material</p> <p>20 formed from a soft substance, the at least one strip of</p> <p>21 material forming a soft surface for contact with the</p> <p>22 skin of the individual at at least one of the border</p> <p>23 edges.</p> <p>24 A Correct.</p>

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<p style="text-align: right;">198</p> <p>1 Q Does Defendant's Exhibit 21 have such a soft 2 surface? 3 A This padding member is not in contact with the 4 skin of the individual. 5 Q So it does not have -- 6 A Correct. 7 Q -- that's soft surface? 8 A I'm sorry, yes. 9 MR. SMITH: That's okay. 10 I thank you for being very patient with me. I 11 don't have any questions at this time, but I may have 12 additional questions in the future. Thank you. 13 THE WITNESS: Thank you. 14 MR. MANZO: I'll have some cross. Let's take a 15 five-minute recess. 16 THE VIDEOGRAPHER: Off the record 4:48. 17 (Recess was taken.) 18 THE VIDEOGRAPHER: On the record 4:56. 19 EXAMINATION 20 by Mr. Manzo: 21 MR. MANZO: Q Mrs. Tracy, you're not an expert in 22 claim construction, are you? 23 A No, I'm not. 24 Q Did you -- I think you might have been asked a</p>	<p style="text-align: right;">200</p> <p>1 soft padding member? 2 A Yes. 3 Q Does claim 10 reflect such a strip or a soft 4 padding member? 5 A Yes. 6 Q Does claim 15 reflect such a padding member? 7 A Yes. 8 Q And in all cases does this strip deflect the 9 effects of the plastic edge? 10 A Does it deflect? 11 Q Yes. Does it reduce -- 12 A Yes. 13 Q -- the adverse effects of the plastic edge of 14 the diaper? 15 A Yes. 16 Q Just a final couple of questions. Are you 17 fairly tired at this moment? 18 A Very. 19 Q Are you undergoing some upheavals in your 20 personal life right now, Mrs. Tracy? 21 THE WITNESS: Yes. 22 MR. SMITH: Objection. What's the relevance? 23 MR. MANZO: I think it's relevant to her testimony 24 today. I'm done.</p>
<p style="text-align: right;">199</p> <p>1 question about claim 1 of your patent, and I thought you 2 said that claim 1 requires the soft padding member to be 3 sandwiched -- I will use that word -- sandwiched between 4 the layers of the diaper. 5 Is that what you meant to say? 6 A No, it is not. 7 Q Is it your understanding that claim 1 can read 8 on or be applied to a diaper that has sandwiched 9 construction? 10 MR. SMITH: Objection, leading. 11 THE WITNESS: It can -- 12 MR. MANZO: Q Can it -- 13 A -- be applied to that, yes. 14 Q Can it be applied to one that doesn't have 15 sandwiched construction? 16 A Yes. 17 Q Turning to your design patent application, which 18 is marked as Exhibit 3 -- 19 A Yes. 20 Q -- does it show that you included a strip of a 21 substance between the layer of the diaper and the skin 22 of the baby? 23 A Yes. 24 Q Does claim 1 reflect such a strip in terms of a</p>	<p style="text-align: right;">201</p> <p>1 MR. BAUMGARTNER: I have nothing further. 2 MR. SMITH: Nothing further at this time. 3 MS. ADDISON: Nothing at this time. 4 THE VIDEOGRAPHER: This concludes the deposition of 5 Rhonda Tracy. The time is 4:59. Off the record. End 6 of tape 3. 7 (Discussion had off the record.) 8 MR. BAUMGARTNER: Okay. On the record. 9 We've all agreed that the court reporter will 10 take the paper exhibits that were marked today, and that 11 the people who brought the physical exhibits will take 12 them away, hold them until the trial of this case and 13 make them available upon reasonable request for 14 inspection by any party. And each of us will read the 15 deposition exhibits that we're taking with us today. 16 For Kimberly-Clark, I will be taking with me 17 Defendant's Exhibit 7A, 8, 10, 11, 12 and 13. 18 MS. ADDISON: Drypers will take Exhibit 19. 19 MR. SMITH: Confab Holding Corporation, Craig Smith, 20 is going to take Defendant's Exhibits 20 and 21. 21 MR. MANZO: And the plaintiff will take Exhibits 7 22 and 9. 23 MR. BAUMGARTNER: Thanks. 24 MR. MANZO: Thank you, everybody.</p>

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<p style="text-align: right;">202</p> <p>1 STATE OF ILLINOIS)) ss: 2 COUNTY OF COOK) 3 4 The within and foregoing deposition of the 5 aforementioned witness was taken before NADINE J. WATTS, 6 CSR, RPR, and Notary Public, at the place, date and time 7 aforementioned. 8 There were present during the taking of the 9 deposition the previously named counsel. 10 The said witness was first duly sworn and was 11 then examined upon oral interrogatories; the questions 12 and answers were taken down in shorthand by the 13 undersigned, acting as stenographer and Notary Public; 14 and the within and foregoing is a true, accurate and 15 complete record of all of the questions asked of and 16 answers made by the aforementioned witness, at the time 17 and place hereinabove referred to. 18 The signature of the witness was not waived, 19 and the deposition was submitted, pursuant to 20 Rules 30 (e) and 32 (d) of the Rules of Civil Procedure 21 for the United States District Court, to the deponent 22 per copy of the attached letter. 23 The undersigned is not interested in the within 24 case, nor of kin or counsel to any of the parties.</p>	<p style="text-align: right;">2736</p> <p>IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION RHONDA TRACY,) Plaintiff,))) - vs-) No. 99 C)) JEWEL FOOD STORES, INC.,) AMERICAN STORES COMPANY,) et al.,) Defendants.)</p> <p>I, RHONDA TRACY, being first duly sworn, on oath say that I am the deponent in the aforesaid deposition taken on May 25, 2000; that I have read the foregoing transcript of my deposition, consisting of pages 1 through 204 inclusive, and affix my signature to same.</p> <p style="text-align: center;">_____ RHONDA TRACY</p> <p>SUBSCRIBED AND SWORN TO before me this ____ day of _____ A.D. 2000.</p> <p style="text-align: center;">_____ Notary Public</p>
<p style="text-align: right;">203</p> <p>1 Witness my official signature and seal as 2 Notary Public in and for Cook County Illinois on this 3 _____ day of _____, A.D. 2000. 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24</p> <p style="text-align: center;">_____ NADINE J. WATTS, CSR, RPR License No. 084-002736 Notary Public 230 West Monroe Street Suite 1500 Chicago, Illinois 60606 Phone: (312) 263-3524</p>	<p>HARTNETT & CATELLANI, LTD. COCHRAN, PUDLO & KOZLOWSKI, LTD. 230 West Monroe Street - Suite 1500 Chicago, Illinois 60606 (312) 263-3524 (312) 236-8461 June 7, 2000</p> <p>Rhonda Tracy 233 Grandview Glen Ellyn, IL 60137 CASE: Tracy -v- Jewel CASE NO.: 99 C 2736 DEP OF: Rhonda Tracy DATE TAKEN: 5-25-00</p> <p>Dear Ms. Tracy:</p> <p>Your deposition testimony given on May 25, 2000 in the above captioned case has been transcribed and inasmuch as signature was not waived, this is to advise that the deposition will be available in our office for 30 days for reading and signing.</p> <p>If you choose to read and sign your deposition at our offices, please call the undersigned for an appointment. Our office hours are from 9:00 a.m. to 4:00 p.m. Monday through Friday.</p> <p>If you choose to make other arrangements for the reading and signing of your deposition, please advise us of the arrangements you have made in writing within 30 days from the date of this letter.</p> <p>Sincerely yours, _____ MARILYN FOLEY</p> <p>cc: Mr. Edward D. Manzo - Cook Alex McFarron Mr. William A. Baumgartner, Jr. - Sidley & Austin Ms. Linda L. Addison - Fulbright (Houston) Mr. Craig R. Smith - Fish (Boston) n.j.w. Job No. 3-66927</p>

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CASE: Tracy -v- Jewel DATE TAKEN: 5-25-00

DEPONENT: Rhonda Tracy

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Reporter: Nadine J. Watts

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RHONDA TRACY,)
Plaintiff,)
)
-vs-) No. 99 C
)
JEWEL FOOD STORES, INC.,)
AMERICAN STORES COMPANY,)
et al.,)
Defendants.)

I, RHONDA TRACY, being first duly sworn, on oath say that I am the deponent in the aforesaid deposition taken on May 25, 2000; that I have read the foregoing transcript of my deposition, consisting of pages 1 through 204 inclusive, and affix my signature to same.


RHONDA TRACY

SUBSCRIBED AND SWORN TO
before me this 31st day of July 2000

A.D. 2000.



Notary Public



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AUG-01-2000 09:43

C A M M C M

3122369216 P.02/02

CASE: Tracy -v- Jewel

DATE TAKEN: 5-25-00

①

DEPONENT: Rhonda Tracy

PAGE

LINE

ERRATA SHEET

1318CHANGE: after "the" insert: strip shown inREASON: this.CHANGE: VREASON: Clarification161CHANGE: "perhaps" to: very likelyREASON: Clarification1714CHANGE: "Except for stating that theREASON: design is for a disposable diaperCHANGE: there is nothing else in the text."REASON: Clarification2624CHANGE: "Yes" to: NoREASON: Question not clear - content5019CHANGE: "Yes" to: NoREASON: Clarification / make sense4510CHANGE: Drop word "then" at the end.REASON: Extra word.5722CHANGE: "Side" to: besideREASON: Reporter may not have heard "be."765CHANGE: "You know" to: As far

(signed)

Rhonda TracyDATE 7-21-00

Reporter: Nadine J. Watts

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AUG-01-2000 09:43

C A M N C M

3122369216 P.02-02

(2)

CASE: Tracy -v- Jewel

DATE TAKEN: 5-25-00

DEPONENT: Rhonda Tracy

PAGE LINE

ERRATA SHEET

76 5
(contin.)

CHANGE: For as I know."

REASON: Hammer

81 21

CHANGE: After "not in written form"

REASON: insert: except that the title

CHANGE: of the patent application recite

REASON: a disposable diaper.

CHANGE: V

REASON: Clarification

119 11

CHANGE: after "something" insert: other

REASON: hammer usage

139 5

CHANGE: "Provided" to "did not provide"

REASON: Clarify sentence

140 23

CHANGE: After "prototype" insert: was to

REASON: Hammer

141 1

CHANGE: Strike from "But (through) model"

REASON: Insert: I did present it to my

CHANGE: attorney, Mr. Van Epps.

REASON: Clarification

151 8

CHANGE: After "implied intention"

(signed) Rhonda Tracy

DATE 7-31-00

Reporter: Nadine C. Watts

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AUG-01-2000 09:43

C A M M C M

3122369216

P. 02-02

CASE: Tracy -v- Jewel

DATE TAKEN: 5-25-00

3

DEPONENT: Rhonda Tracy

PAGE LINE

ERRATA SHEET

1518
(cont.)

CHANGE:

insert: That is an implicit

REASON:

disclosure

CHANGE:

V

REASON:

Clarification162241631+2

CHANGE:

From beginning & insert: "One

REASON:

soft padding member is marked

CHANGE:

as 50."

REASON:

Clarification16316

CHANGE:

After "not" insert: required

REASON:

to be.

CHANGE:

Clarification163241641

REASON:

Change after and: "To the

CHANGE:

extent that I understand your

REASON:

question, the patent says

CHANGE:

element 50 of Fig. 2 is the soft.

REASON:

padding member (for the wristband,

CHANGE:

V

REASON:

Clarification17415

CHANGE:

"ipsissimis" to: ipissima

(signed)

Rhonda Tracy

DATE

7-31-00

Reporter:

Nadine J. Watts

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CASE: Tracy -v- Jewel

DATE TAKEN: 5-25-00

DEPCONENT: Rhonda Tracy

PAGE

LINE

ERRATA SHEET

4

CHANGE:

174

15

(contin.)

REASON:

Spelling

CHANGE:

49

4

REASON:

Special note: (Question of

CHANGE:

P. 49 1-3 not completely clear)

REASON:

Context

CHANGE:

REASON:

CHANGE:

REASON:

CHANGE:

REASON:

CHANGE:

REASON:

CHANGE:

REASON:

CHANGE:

REASON:

CHANGE:

(signed)

Rhonda Tracy

DATE

7-31-00

Reporter: Nadine J. Watts

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